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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-767

UNITED STATES OF AMERICA, *Appellant*

v.

THE CONNECTICUT NATIONAL BANK, THE FIRST NEW HAVEN NATIONAL BANK, AND JAMES E. SMITH, Comptroller of the Currency, *Appellees.*

On Appeal from the United States District Court for the District of Connecticut

BRIEF FOR COMPTROLLER OF THE CURRENCY

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BRIEF FOR COMPTROLLER OF THE CURRENCY

QUESTIONS PRESENTED

1. Can the Supreme Court reverse Findings of Fact by the District Court which are supported by substantial evidence?

2. Are the Findings of the District Court in this case supported by substantial evidence?

3. Do federal statutes prohibit the merger of two banks which are not in actual competition and which are forbidden by law to enter each other's primary area except by merger?

4. What is potential competition? Is it merely possible competition or probable and imminent competition?

5. Is plaintiff's theory of potential competition applicable to a field like banking where entry is completely controlled by government?

6. Does a finding by the District Court that a proposed merger probably will not lessen competition preclude the District Court from making a further finding on the evidence that the merger will meet the convenience and needs of the community to be served?

STATUTES AND REGULATIONS INVOLVED

Section 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), provides in pertinent part:

> The * * * [Comptroller of the Currency] shall not approve * * * any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Section (7)(B) reads:

> (B) In any judicial proceeding attacking a merger transaction approved under paragraph (5)

on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

12 U.S.C. 36 provides in pertinent part:

* * * * * * * * *

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) . . .; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks

Conn. Gen. Stats. Ann, 36-59, as amended, provides in pertinent part:

> (1) With the approval of the commissioner, any state bank and trust company having a combined

capital and surplus of not less than one million dollars may:

(a) Establish and operate one or more branches within the town in which such state bank and trust company is located;

(b) Establish and operate one or more branches in any town or towns within this state in which the main office of no state bank and trust company or national banking association is located, provided the capital stock and surplus of such state bank and trust company is in excess of one million dollars.

* * * * * * * * *

12 C.F.R. § 4.2 governing the organization of national banks reads in pertinent part:

§ 4.2 Organization of national bank.

(a) Application. Persons desiring to organize a national bank should submit to the Regional Comptroller of the Currency for the region in which the proposed bank is to be located, an "Application to Organize a National Bank." This application, supplementary forms, and instructions for their preparation and filing are furnished upon request submitted to the Comptroller of the Currency or to the Regional Comptroller.

(b) Investigation. The Comptroller of the Currency may conduct such investigation as he deems necessary or proper, including the gathering of information as provided in Part 5 of this chapter. Matters investigated include:

(1) The adequacy of the proposed banks capital structure.

(2) The earning prospects of the proposed bank.

(3) The convenience and needs of the community to be served by the proposed bank.

(4) The character and general standing in the community of the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.

(5) The banking ability and experience of proposed officers and other employees. If the persons referred to in subparagraph (4) of this paragraph are not ready, within 30 days after filing of the application, to submit to and cooperate in the investigation, the Comptroller may treat the application as abandoned.

(c) Preliminary approval. The Comptroller of the Currency determines whether or not preliminary approval of the application should be granted. If preliminary approval is granted, the Comptroller may, if he determines that such action is necessary or desirable for the protection of the public interest, at any time withdraw such approval or provide that final approval shall be subject to the fulfillment of conditions specified by him.

(d) Corporate organization. If preliminary approval is granted, the applicants are furnished with suggested forms of documents necessary for the corporate organization of a national banking association and instructions for their preparation and filing. The proposed bank does not become a body corporate until certain of these documents have been accepted for filing by the Comptroller of the Currency.

(e) Commencement of business. The Comptroller of the Currency determines whether or not the national banking association is entitled to commence the business of banking. If the Comptroller's determination is favorable, he issues a certificate, known as a charter, which provides that the national banking association is authorized to commence the business of banking.

STATEMENT

A. The Geographical Location and Separation of the Banks.

Connecticut is bounded on the west by New York State, on the north by Massachusetts on the east by Rhode Island and on the south by Long Island Sound. Connecticut covers 5,009 square miles in area and is the third from the smallest state by this measure, ranking 48th.

A look at the map will show the small size of the State. It is approximately 42 miles from the midpoint of the western border of Connecticut to the City of Hartford, the geographic center of Connecticut, and 46 miles from Hartford east to the Rhode Island border. Thus from the New York/Connecticut border on the west to the Connecticut/Rhode Island border to the east is approximately 88 miles. From Hartford to the north western corner of Connecticut it is approximately 45 miles. From Hartford to the south western corner of Connecticut is approximately 75 miles. To the north eastern corner of Connecticut from Hartford is approximately 50 miles and from Hartford to the south eastern corner of the State is approximately 52 miles. (Rand McNally Road Atlas, United States, Canada, Mexico, 49th Annual Ed.)

New York City is approximately 59 miles from Bridgeport, Connecticut, the headquarter city of Connecticut National. Bridgeport is located on Long Island Sound in Fairfield County. New Haven, Connecticut, the home office city of First New Haven, is some twenty miles to the east of Bridgeport along the shores of Long Island Sound in New Haven County. The towns of Stratford, Milford and West Haven separate the two headquarter towns (App. 2229). Southwestern

Connecticut is a bedroom community for New York. It was established by objective evidence that more than 24,000 deposit and loan accounts of Connecticut customers are held by six of the over seventy banks in New York City. These figures do not take into account the time and savings deposits of First National City Bank (App. 2331).

Although far from complete, the Special Masters report shows that the six New York City banks made 1,071 commercial and industrial loans to companies with Connecticut addresses. The balances on these loans total $321.1 million (App. 2352).

Of the 23,000 demand deposit and time and savings accounts with Connecticut addresses held by the six New York City banks about 1,000 are large accounts and the remaining 22,000 are small accounts opened by commuters. (App. 622-623) New York City banks have a regular calling program using road men who solicit accounts in Connecticut (App. 407-408, 1156, 2331). New York banks advertise heavily in newspapers and on television as well as in railroad stations in Connecticut for the benefit of commuters (App. 567-568; 1145). Plaintiff's trial exhibits show that more than 16,000 of the 79,000 workers in the Stamford SMSA worked in New York during 1970, and during the same year 6,100 of the 44,636 workers in the Norwalk SMSA also worked in New York. These figures combined with other statistics indicate that at least 25,770 Connecticut residents commuted to New York in 1970 (App. 1438-1455). The amount of commuting done by New York residents into Connecticut has increased substantially from 1966 when approximately 7,340 New York residents were employed in Connecticut to 24,893 in 1970. Plaintiff's expert conceded this 300 per cent increase.

(App. 289; 295; 1438-1455; 1462). Thus a total of at least 50,000 workers commute daily from New York to Connecticut and vice versa. (App. 290; 1438-1455; 1462).

Connecticut National branch offices are located adjacent to Westchester County, New York, primarily in Fairfield County, to a lesser extent in New Haven County and with a single office in Litchfield County which also borders New York State. All of First New Haven's twenty two offices are located in New Haven County towns in the south central part of the State. (App. 2229-2230)

B. The Banking Structure in Connecticut Is Not Becoming More Concentrated.

In the State of Connecticut, without regard to the competition of mutual savings banks, Connecticut National at year end 1971 had less than 6.6 per cent of the deposits of Connecticut commercial banks while First New Haven had less than 4.7 per cent. The combined share would produce an increase of less than 1.8 per cent in the combined shares held by the ten largest commercial banks in the State and an increase of less than 0.9 per cent in the combined share of the five largest banks including savings banks, headquartered in Connecticut (App. 633; 2020). If allowance is made for the business done by New York banks in Connecticut these figures are further reduced.

The share of the total commercial bank deposits held by First New Haven and Connecticut National combined, declined from 11.2 per cent at year end 1971 to 10.3 per cent at year end 1972 (App. 2554). Defendants combined share of total deposits held by Connecticut headquartered banks has decreased from 6.8 per

cent in 1959 to 4.9 per cent in 1970 (App. 2019). Their combined share of deposits held by commercial banks in Connecticut decreased during the same time period from 13.8 per cent in 1959 to 11.6 per cent in 1970, slipping further to 10.3 per cent in 1972 (App. 2027; 2554). The New Haven Savings Bank with deposits at year end 1971 of $354 million and the Connecticut Savings Bank, New Haven with deposits at year end 1971 of $301 million were both larger than First New Haven with deposits of $266 million at year end 1971. In Bridgeport, Peoples Savings Bank with deposits of $721 million at year end 1971 was nearly twice the size of Connecticut National at year end 1971 with $375 million in deposits (App. 2257; 1550).

Instead of tending towards increased concentration of banking in Connecticut, the trend has been in the opposite direction during the 1955-1971 period. During that time objective evidence shows that in almost every Connecticut town the number of banking alternatives available to the Connecticut banking public has increased or stayed the same. The undeniable result is that there is now increased competition and better banking service available to the public in almost every Connecticut town (App. 619; 2004-2009). Thus, in New Haven County where all of First New Haven's offices are located, there was an increase in the number of alternative banking offices in 23 out of the 27 towns in the County; while in Fairfield County where the majority of Connecticut National's branches are located there was an increase in the number of banking offices during the time period involved in 20 of the 23 towns in the County. Each of the 169 towns in Connecticut was analyzed and in 107 of them there was an increase in the number of banking offices during the

1955-1971 period; in 60 towns there was no change; and in only two towns in the entire State was there a decline in the number of bank offices during the time period (App. 619; 942; 2004-20009).

Connecticut banking, if measured by the plaintiff's merger guidelines published in 1968, is not highly concentrated. Under the standards set out in those guidelines a "highly concentrated" market is one where the four largest firms combined market share is 75 per cent or more whereas plaintiff's trial exhibit claims the four largest Connecticut commercial banks control 54.5 per cent of the market (App. 1550).

Although plaintiff alleged the number of banks in Connecticut has decreased from just over one hundred in 1955 to over 60 in 1971 perhaps the best proof that this fact has resulted in a more competitive banking structure in Connecticut is the testimony of plaintiff's expert Dr. Murphy who testified that in Connecticut the banking structure is more competitive today with less banks than it was in 1955 with more banks (App. 273).

No later than 1975, most of the 68 mutual savings banks in Connecticut with a total of 229 offices will have demand deposits accounts as well as other competitive services available to compete throughout the state with commercial banks (App. 2255, Table 5; App. 2555).

Since the close of the record in this case new bank charters have been approved by bank regulatory authorities in the towns of Bridgeport, Trumbull, Monroe, Fairfield, Shelton and Ridgefield which means there are now six new banks in Connecticut. The number of commercial banks in Connecticut in 1963 was

the same as in November 1972 at close of trial (64). There are now 70 (App. 1597; 2381-2390; cf. n. 7, J.S. 6 and n. 43, J.S. 28).

In the two and three-quarter years between December 1969 and September 1972, two large statewide banks, Connecticut Bank and Trust Co. (CBT) and Hartford National, increased their deposits in an amount greater than the entire deposit structure of the consolidated bank. During this period, the two Hartford banks increased their deposits by a total of approximately $745 million. In contrast First New Haven and Connecticut National had total deposits on a consolidated basis of $672.8 million as of September 30, 1972 (App. 2379; 943). During this period Hartford National increased its deposits by 40.8 per cent and CBT by 47.8 per cent while First New Haven and Connecticut National on a consolidated basis increased their deposits by 21.7 per cent (App. 2379).

Holding 34.5 per cent of commercial bank deposits as of year end 1959, the two giant Hartford based banks, Hartford National and CBT increased their share of state deposit totals to 40.1 per cent at the end of 1973. This figure increased to 41.3 per cent of total commercial bank deposits held by Connecticut banks at year end 1972. Thus any increase in concentration of deposits among Connecticut banks or commercial banks in Connecticut is entirely due to Hartford National and CBT and the two largest savings banks, Society for Savings, Hartford, and Peoples Savings Bank, Bridgeport, all four of which are considerably larger than the defendants here. (App. 2257; 2018-2020; 2023; 2554)

C. The Merging Banks Are Not in Actual Competition

In both its Jurisdictional Statement at footnote 1 and its Brief at footnote 1, plaintiff states the elimination of actual competition is not an issue in this appeal. In its Questions Presented on p. 2 of the Jurisdictional Statement and on p. 2 of its Brief there is not the slightest hint that the elimination of actual competition is present in this appeal. It is clear that this is strictly a potential competition case.

D. State and Federal Law Forbid Entry by Each Bank into the Town Served by the Other Except by Merger

Connecticut National is headquartered in Bridgeport while First New Haven is headquartered in New Haven. Bridgeport and New Haven are "closed" towns, that is each contains the main or home office of one or more commercial banks and are therefore closed to *de novo* branching by banks not headquartered there.[1] Thus, it is legally impossible for a bank such as First New Haven to branch *de novo* into Bridgeport

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[1] Conn. Gen. Stat. Anno. § 36-59 as amended: Sec. 36-59 (Amended 1959). Branches.

(1) With the approval of the commissioner, any state bank and trust company having a combined capital and surplus of not less than one million dollars may:

(a) Establish and operate one or more branches within the town in which such state bank and trust company is located;

(b) Establish and operate one or more branches in any town or towns within this state in which the main office of no state bank and trust company or national banking association is located, ...

(c) Continue to operate as a branch in the same or approximately the same location, the business of any other banking institution, located within this state, which business has been acquired by purchase, consolidation or merger. . . .

and it is also legally impossible for a bank such as Connecticut National to branch *de novo* into New Haven. Branching by national banks is subject to 12 U.S.C. § 36 which authorizes national banks, with the approval of the Comptroller, to branch *de novo* only wherever a state bank is authorized by state law to do so. There are a number of "open" towns in the area served by Connecticut National and in the area served by First New Haven where one of the defendants has a branch and where it is legally possible for the other defendant bank to branch, but these towns are already adequately banked and the addition of one more *de novo* banking office would drop the population per banking office below the state average of 5,633 for such towns (App. 805). This strongly suggests that these towns are not sufficiently attractive economically to lure an additional entrant, and since bank regulatory authorities consider population per banking office in arriving at their decision on *de novo* branch applications, bank regulatory approval is not likely. (App. 1109; 235; 1211).

The present policy of the Comptroller will not permit significant *de novo* penetration by Connecticut National into the service area of First New Haven and vice versa. (App. 1109) The Comptroller's moratorium on new bank charters announced in a public statement of February 19, 1965 (App. 2573-2575) [2] has also been consistently applied to *de novo* branch applications in major banking markets (the population centers) to the extent that no outside entrant,

[2] The Comptroller's public statement is published beginning on p. 2573 of the Appendix. Due to a printer's error, the second page of the statement appears on p. 2575 of the Appendix, and the third page on p. 2574.

with one exception, has been permitted to enter such markets in Connecticut (App. 1109). Accordingly, the Comptroller is not willing to allow significant *de novo* branch penetration by either defendant bank into the service area of the other (App. 1109).

Another method of entry plaintiff suggests be used by defendants to enter each other's closed home office towns is by creating a holding company to charter a new bank in the closed town and later merging with it. This scheme of plaintiff has never been attempted in Connecticut. That is an objective fact even though at trial it was established that 22 new banks have been chartered in Connecticut since 1965. (App. 231; 323; 779; 1597). The reluctance of Connecticut bankers to try this scheme stems from serious doubts as to the legality of chartering a de novo bank in a closed town to circumvent the state's home office protection statute, and would probably result in a plethora of law suits. (App. 1317). The Connecticut State Banking Department does not permit the chartering of a new bank for the purpose of immediate sale to other than the local organizers and the application form so states. (App. 1312; 2017; 2432-2435; 2553)

From January 1, 1962, through October 27, 1972, at least 25 new Connecticut bank charter applications were submitted to the Comptroller, of which only 5 were approved, while only one came in the town of Stamford after the Comptroller's 1965 moratorium. (App. 1029-1030; 2387-2390; 2573-2574). Thus, plaintiff's suggestion for *de novo* entry by means of a holding company is legally dubious and highly speculative both because this mode of entry has never been used and in view of the low percentage rate of *de novo* charter approval by national banking authorities.

E. Objective Economic Conditions in Bridgeport and New Haven Indicate No Practical Alternative Method of Achieving the Purposes of the Merger.

Compared to the State, the objective evidence shows that Bridgeport is a slow growth area, particularly in retail sales, total employment, employment in manufacturing and population. (App. 782-784; 2202). The fact that Bridgeport experienced significantly lower economic growth than Connecticut as a whole makes *de novo* entry into Bridgeport either by branching or chartering a new bank far from attractive. (App. 784). Connecticut's State Planning Office projects a modest decrease in population for the town of Bridgeport during the period 1970-1980 which of course means that no bank could enter Bridgeport without reducing the population per bank office further. (App. 798; 2205)

With respect to New Haven, the objective evidence shows that in the areas of retail sales and wholesale sales, New Haven has not grown nearly as fast as the state as a whole. In the areas of total employment, number of manufacturing employees, value added by manufacturers and population, New Haven has declined compared to the state. (App. 788-789; 2203). New Haven has not kept pace in terms of economic growth with the balance of the state and in fact has had an even slower growth than Bridgeport. (App. 791; 2202-2203).

F. The Proceedings Below Were Thorough and Proper

(1) The proceedings and decision of the Comptroller

On November 19, 1970, an agreement was entered into between the respective boards of directors of The Connecticut National Bank, Bridgeport, Connecticut

(Connecticut National) and The First New Haven National Bank, New Haven, Connecticut, (First New Haven) to consolidate under the charter of the latter and with the title of "The First Connecticut National Bank." Application was then made by the two banks on February 2, 1971, to the Comptroller of the Currency for permission to consolidate. Pursuant to provisions of the Bank Merger Act of 1966, 12 U.S.C. 1828(c), the Comptroller sought and received from the Department of Justice, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation reports on the competitive factors involved in the application. After giving due consideration to these reports and to other factors as required by the Bank Merger Act bearing upon ". . . the probable effect of the transaction in meeting the convenience and needs of the community to be served," the Comptroller approved the proposed consolidation on July 26, 1971.[3]

In his opinion, the Comptroller pointed out the anomaly of an economically vibrant Connecticut which must depend on out-of-state banks for its continued expansion. (App. 2566) Because Connecticut's banks are small in relation to the vast amount of com-

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[3] It should be noted that the Comptroller of the Currency was the only regulatory agency which evaluated and balanced *both* the competitive factors and the needs and convenience factors in the case at bar. The opinions rendered by the three other agencies are based solely on an analysis of competitive factors, as required by 12 U.S.C. 1828 (c)(4), and do not include an assessment of the needs and convenience aspects. Indeed, both the Federal Reserve Board and the FDIC competitive reports contain express disclaimers of any intent to go beyond the competitive factors. While the report of the Department of Justice makes no such disclaimer, the Department's views clearly do not include an analysis of needs and convenience criteria. (App. 1618-1633)

merce generated on the Hartford-New Haven-Bridgeport-New York City axis, a large segment of Connecticut industry cannot obtain adequate financial services from banks within the State's borders. As a result, out-of-state banks largely finance Connecticut's industrial development and drain banking profits from the State. Connecticut's own banks are limited to a minor share in the State's growth. (App. 1097; 1238-1239)

The Comptroller was also of the opinion that existing competition between the two banks is restricted to a small area and could not be termed "substantial," as that concept is employed in either § 7 or in 12 U.S.C. 1828(c)(5)(B). The likelihood of potential competition in the reasonably foreseeable future between the two defendants was remote, in the Comptroller's view, because of the restrictive nature of Connecticut's home-office-protection banking statute and the economic infeasibility of establishing a significant number of de novo branches in each other's trade areas, or elsewhere. (App. 2570)

Banks which wish to merge are instructed by the Regional Administrator of National Banks to prepare balance sheets and earnings statements for the two preceding years and a map showing their branch locations. An appointment is then made to see the Deputy Comptroller of the Currency for Mergers and Branches in Washington to discuss the application. (App. 1182-1183) The Comptroller requires that the applicants submit with the formal merger application evidence relating to the competitive factors involved in the merger proposal. Prior to acceptance of the application for filing, a review is made by the Comptroller's Office in Washington to determine its completeness. (App. 1183)

After the formal merger application is filed, the Regional Administrator orders a field examination. Upon completion, the field report is forwarded to Washington accompanied by the Regional Administrator's recommendation. In Washington, the application and reports from the field are reviewed by the legal division, the corporate division, and several other officials before the Comptroller renders his final decision. (App. 1183-1184) Although the field examiner took only eight days to conduct his field investigation of the defendants' application, he is able to do this fairly quickly because he basically checks on the validity of the data in the application, calls on competitor banks, and distills the history of the banks' examination reports in order to answer questions on the condition and management of the banks, their capital adequacy, earnings and future prospects. The field examiner is not required to compile from original sources the mass of information contained in the application or in the Comptroller's files; rather, his function is more a verification. (App. 1183-1184)

Copies of the application in this case were sent to the Department of Justice, the Federal Reserve Board and the Federal Deposit Insurance Corporation pursuant to the Bank Merger Act of 1966. The application is the information that plaintiff had as the basis of this law suit, and the Comptroller's Office furnished no additional information to the Department of Justice prior to the filing of its Complaint in this case. (App. 1184; 2209-2225)

The responsibilities of the Regional Administrator are to supervise the condition, solvency and liquidity of the national banks in his region and to supervise

and investigate all applications for new charters, branches, relocation of offices, and merger or acquisition applications. The Regional Administrator of the First National Bank Region supervises all 206 national banks in the six New England states. He supervises 115 full-time people, including 92 commercial bank examiners who examine the commercial side of the bank and nine trust examiners who examine the trust departments only. (App. 1094) As of December 31, 1972, there were 26 national banks headquartered in Connecticut. (App. 1094-1095)

Banking is distinguished from most commercial enterprises in that both state and federal governments insist on maintaining the stability and solvency of stable banks and banking for the public. If a bank fails, it is detrimental to the whole community. Banking is therefore regulated to insure that there is competition; but also to assure that competition is not unbridled and does not become so intense that bank failures result. Bank regulators "carry water on both shoulders" in that they must assure both competition and solvency in the banking industry. (App. 1119-1120) Too much competition in banking is not desirable because bank failures result. (App. 1120-1121) It is a matter of history that during the 1930's there were many bank failures across the nation resulting in substantial losses to depositors. Bank funds are typically composed of only about 10% stockholders' equity and the balance is depositors' money. Congress passed the FDIC Act to insure these deposits. Non-regulated businesses are free to compete in an unbridled manner and to open new branches or offices. Banks cannot open an office without regulatory approval. No national bank is a potential entrant unless

the Comptroller of the Currency authorizes a branch. (App. 1127-1129)

By statute (12 U.S.C. §481), Congress requires that banks be examined by the Comptroller's Office to insure the health of the banking industry. Congress realized that a healthy financial industry is the lifeblood of the nation's economy. Thus banks are regulated to prevent them from conducting their affairs in an unsafe and unsound manner. The bank regulatory process is involved in banking "from shortly after conception to the grave." (App. 1185)

The Comptroller is required by the Bank Merger Act to consider the financial and managerial resources and future prospects of existing and proposed banking institutions and does so in each case. (App. 1186-1187) In weighing these factors in both mergers and branches, the Comptroller's office must decide whether the application is procompetitive and should be authorized, or whether it should deny the application on the ground that Congress requires maintenance of a safe and sound banking system to protect the public's assets. (App. 1186-1187) The national policy favoring competition and the national policy favoring bank solvency sometimes conflict. Thus under the Bank Merger Act if the regulatory agency finds a bank is failing, the competitive reports from the Department of Justice and the other agencies can be dispensed with. (App. 1187)

The Comptroller's Office spends between 250 and 280 man-days examining a bank the size of First New Haven. Connecticut National requires between 420 and 450 man-days. (App. 1177-1178) Federal statutes

(12 U.S.C. §481) require that national banks be examined three times in every two years. Generally, they are examined between eight and twelve months apart. (App. 1099) All of these facts and considerations entered into the deliberations of the Comptroller and constituted part of the foundation for his decision in this case.

2. The trial and decision in the District Court

The complaint in this case was filed on August 23, 1971. The Comptroller intervened as a party on October 19, 1971. Extensive pretrial discovery was had against the defendants commencing shortly after the filing of the complaint and against the Comptroller following his intervention. A number of depositions were taken. Interrogatories were liberally used by all and extensive documentary discovery was had. Discovery by all parties lasted over a year. Trial commenced on October 10, 1972. Testimony was heard from twenty-four witnesses the majority of which were called by defendants and the Comptroller. Sixteen trial days were consumed spanning a period of five weeks. All parties rested on November 15, 1972. The trial transcript was lengthy covering 2,253 pages and a total of 243 trial exhibits were introduced by the parties. All parties, of course, were afforded opportunity to cross examine which was fully utilized, and following the defendants' and Comptroller's case, plaintiff put on rebuttal. Voluminous Pretrial and Post Trial briefs totaling over 350 legal size pages were filed by all parties and almost 1,500 proposed findings of fact and conclusions of law were submitted by defendants and the Comptroller, and over 600 more were proposed by plaintiff, totaling 2,132 for the three

parties. A full afternoon was set aside for closing oral argument held on February 26, 1973. After careful study the Court handed down its lengthy opinion approving the consolidation on June 22, 1973. The Court made 293 findings of fact and supported each with evidence and citations to the record.

SUMMARY OF ARGUMENT

I. Although this is an antitrust case which comes directly to the Supreme Court on appeal from a decision of a district court, the rule of appellate review is no different than in other matters. The function of this Court is not to decide factual issues de novo, and the findings and conclusions of the district court can be set aside only if they are clearly erroneous. Nevertheless, plaintiff, in effect, is seeking a trial de novo on the facts.

II. The findings of the District Court in this case are fully supported by substantial evidence on all significant points.

(A) The District Court found that the State of Connecticut was the relevant geographic market. Plaintiff argued that separate Standard Metropolitan Statistical Areas are the relevant markets, but introduced no evidence showing that these areas were appropriate banking markets. Plaintiff's expert testified that the relevant geographic market was the area in which decisions are affected by participants. Defendants showed that the service areas of the banks extend beyond the respective SMSAs and that their decisions are based upon competition within their service areas. The Comptroller contended at trial that the geographic market should include New York City.

Evidence showed that New York City banks had $484 million in deposits and $381 million in loans from Connecticut residents, that New York banks advertise and solicit in Connecticut, and have a competitive impact in the state. The District Court found that there was no area of competitive overlap between the merging banks and that the area in which the competitive impact of the merger would be felt was the State of Connecticut.

(B) Plaintiff introduced no evidence on line of commerce, but relied on past decisions of this Court for the contention that commercial banking is the line of commerce. Plaintiff's chief expert witness testified that commercial banks and savings banks in Connecticut compete directly for the major part of their business, including commercial loans, and the statistics establish this. A recently enacted Connecticut law authorizes savings banks to carry checking accounts. In the light of all the facts, the District Court found that the relevant line of commerce included both commercial and savings banks. In any event, this finding affects only the concentration ratios, and the other findings and conclusions of the District Court are not dependent on the inclusion of savings banks in the line of commerce.

(C) The merging banks both had some branches in a small four town area between their home offices. However, as a condition of the merger, the banks undertook to divest themselves of six branches in these four towns. As a result, there is no vestige of actual competition between the merging banks involved as an issue in this case.

(D) Plaintiff's argument is that the merger will eliminate potential future competition between the

merging banks. However, virtually insuperable barriers exist to entry by either bank into the area principally served by the other. Connecticut has a "home office protection law" which prevents entry by any bank into any city or town in which another bank has its headquarters, except by way of merger. Consequently there are only a few peripheral suburban areas in the fringes of the service area of each bank into which the other could possibly enter, and such entry would not be significant or substantial. Plaintiff argued that the law might be circumvented by establishment of a holding company which might charter a new bank in the home town of the other; but the policy of both state and national banking authorities would forbid granting such a charter. The evidence also showed that no bank or bank holding company in Connecticut had ever attempted to use the procedure proposed by plaintiff.

(E) The District Court found that there was no economic incentive for either bank to enter the service area of the other, either de novo or by foothold entry, or to compete against each other in any new market or service area. This finding was supported by detailed analysis of the objective economic circumstances involved in each possibility of entry. Both Bridgeport and New Haven, the home towns of the merging banks, are growing less rapidly than the state as a whole, and, in some respects, are not growing economically or demographically. The financial strength of the banks would not support the cost of such entry. The procedure suggested by plaintiff for circumventing state law would be particularly costly and highly hazardous legally. An examination of all "open towns" in Connecticut shows that many had no banks because their

populations were too small, and the remainder were too small to support two competing banks. Consequently the possibility of potential future competition between the merging banks is extremely remote.

(F) On the other hand, the merger of the banks involved here will produce a combined bank which will be large enough to compete on a state-wide basis with the two giant Hartford banks which are now the only two banks able to operate state-wide. Therefore, the merger of the two banks in this case will increase actual competition in the state.

(G) The District Court found that the merger would produce substantial benefits to the public interest in meeting the needs and convenience of the public. These are set forth in great detail in the District Court's decision (362 F.Supp. 272-278), and are only summarized in the brief. In addition to providing increased state-wide competition in banking, the merger will provide a broader range of banking services to individuals and small businessmen. Among other things, such services will benefit the members of organizations such as the Knights of Columbus, will facilitate the construction of public housing projects, and will provide better administration for pension funds, as well as providing more adequate lending limits for medium sized businesses.

III. (A) Examination of the prior decisions of this Court clearly shows that §7 applies only to mergers where the anticompetitive effect is reasonably probable, and that "potential competition" means competition which is "sufficiently probable and imminent" to come within this criterion.

(B) Nevertheless, plaintiff is apparently using the term "potential competition" in the dictionary sense

of the word "potential" which means "possible as opposed to actual." Plaintiff's case is based on the *possibility* rather than the *probability* of some hypothetical alternative mode of serving the purposes of the merger. This leads plaintiff into a number of fallacies, errors and inconsistencies in argument. For example, in the Washington case plaintiff argues that the provision of additional banking services is not an aspect of banking competition, whereas in the Connecticut case plaintiff argues that differences in evening hours of service are an aspect of banking competition.

(C) Plaintiff's literal absolutist view leads to the argument that any lessening of merely possible future competition is forbidden by §7. This, in turn, leads plaintiff to the ultimate paradox that any increase in actual competition by the entry of a new competitor is forbidden because it will result in a lessening of potential competition. This paradox is illustrated here where plaintiff argues that increasing concentration of banking in the state is a reason for preventing the proposed merger. However, the data show that the increase in concentration results entirely from the increasingly large share of banking deposits and assets held by the two dominant state-wide banks. The merger proposed here will provide a third state-wide competitor. Thus plaintiff argues that the growing strength and dominance of the competitors of the merging banks is a reason for preventing the merger that will provide more actual competition. This argument is contrary to common sense and also to the intent of Congress, as stated by this Court in Brown Shoe (370 U.S. at 319), and to rational antitrust analysis.

(D) The reasoning by which plaintiff uses "potential" to mean "possible as opposed to actual" is the

reasoning on the basis of which every authoritarian government in recent history has persecuted its "potential enemies." This leads to the situation in which accusation is tantamount to conviction and in which due process is lost and civil rights are abolished. The ultimate logic of plaintiff's theory would endanger not only the competitive system but the civil liberties of all citizens.

IV. It is well established by decisions of this Court that "section of the country" means the same as "relevant geographic market." Nevertheless, plaintiff argues that the two terms are not synonomous and that it can discern some anticompetitive effects in areas which are not relevant geographical markets. It erroneously cites the Pabst Brewing case (374 U.S. 546) for this. Plaintiff makes the same argument in both the Washington and the Connecticut cases, and it leads to similarly absurd conclusions. Basically plaintiff contends that it need not specify either the geographical area or the particular possibility of anticompetitive effect if it merely mutters the incantation of "potential competition." This clearly is not the law.

V. In order to specify any possible future competition between the merging banks in either of the companion cases before the Court, plaintiff is forced to propose a procedure by which the banks might, hypothetically, circumvent the state laws in order to become competitive with each other. Plaintiff's proposals are clearly questionable and hazardous legally, at best, and therefore cannot be considered as prudent or probable courses for a banker to undertake. Furthermore, if plaintiff's schemes were successfully undertaken they would undermine and weaken the dual banking system, which is responsible for making bank-

ing in this country one of the most competitive fields. Therefore, plaintiff's proposals in these bank merger cases would ultimately be far more anticompetitive in effect than any proposed bank mergers.

VI. The proper and reasonable meaning of "potential competition" in antitrust law is "probable entry," or, more precisely, "probable and imminent entry." The economic purpose of entry is to increase competition by increasing supply. However, the potential competition theory is not logically applicable in a field like banking because both entry and supply are controlled by government, not by market forces. Entry into the field of national banking is subject to the discretionary permission of the Comptroller; and the money supply of the country is regulated by the Federal Reserve Board. Furthermore, entry into the field of banking is limited to protect the solvency and stability of banks. Therefore, entry depends upon the needs and convenience of the community. Consequently, in order to prove probable entry it is necessary to prove that the entry will serve the needs and convenience of the community. Therefore, the logic of the potential competition theory in the field of banking destroys the distinction between the analysis of competition and the analysis of convenience and needs, and shifts the burden of proving that the potential alternative to the assailed merger will better serve the convenience and needs of the community from defendants to plaintiff. The statutory plan and the economic logic of the banking system combine to show that the theory of potential competition is simply not applicable to the field of banking.

VII. It is clear that in antitrust, as in other cases, plaintiff has the burden of proof of all the elements

of the statutory violation charged. In this case plaintiff has failed to produce evidence to prove any of the elements of a violation of §7. The principal point of contention has been the competitive impact of the merger. On this point, plaintiff has failed to offer evidence either to show any anticompetitive impact from the merger or any probable alternative to achieve the same purposes. Plaintiff has offered only an abstract theory of hypothetical possibilities. All of the objective evidence shows that the merger will have a procompetitive effect on actual competition and will provide numerous other benefits to the public.

VIII. Failure to consummate this merger will result in perpetuating the dominance of the two state-wide banks in Connecticut, entrenching their position, and insuring increasing concentration of banking assets and business in those banks. Consummation of this merger will add one more actual competitor to the state-wide banking market and will substantially increase actual competition within the state.

IX. Plaintiff argues that the District Court could not properly make findings on convenience and needs because it arrived at what plaintiff regards as an incorrect conclusion on the competitive issues in the case. Plaintiff relies on the Nashville Bank case (390 U.S. 171) for this argument. However, that case expressly states that a court can make findings on convenience and needs even though it finds no anticompetitive effects. (390 U.S. 184, n. 17) Furthermore, in a potential competition case all consideration of competition is necessarily hypothetical and assumed. The Bank Merger Act explicitly requires the courts to consider convenience and needs in *all* bank merger cases. Therefore, plaintiff is clearly wrong in arguing

that the District Court was precluded from making findings on convenience and needs, regardless of the findings it made on the issue of competition.

X. This Court has said that under the Bank Merger Act the ultimate test of the validity of a bank merger is the public interest determined by weighing both the impact on competition and the convenience and needs of the public to be served by the merged bank. Where there is extinction of actual competition between two banks, substantial benefits must be shown to outweigh the disadvantages of lessening competition. However, where the alleged anticompetitive impact consists only of lessening potential competition it is obvious that the weight of the competitive element must be considerably less than when actual competition is involved. In any event, the detailed, meticulous and numerous findings of the District Court showing the many benefits to the needs and convenience of the public from the proposed merger are more than adequate to show the validity of the merger under any standard.

ARGUMENT[4]

I. THE SUPREME COURT CANNOT REVERSE DISTRICT COURT FINDINGS OF FACT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Court has made abundantly clear that appellate courts "must constantly have in mind that their

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[4] The instant case is one of two bank merger cases now pending before this Court and in which tandem argument has been ordered. The two cases are *United States* v. *Marine Bancorporation, Inc., et al.*, No. 73-38, arising in the State of Washington, and *United States* v. *The Connecticut National Bank, et al.*, No. 73-767, arising in the State of Connecticut. The Comptroller of the Currency is a party in both cases. Since the issues in the two cases are similar or identical, and since the position of the Comptroller is essentially the same in both cases, the arguments presented on behalf of the

function is not to decide factual issues *de novo.*" *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969). In the context of an antitrust case, the Court has declared that findings of fact cannot be set aside as "clearly erroneous" merely because the Court might give the facts another construction, resolve the ambiguities differently, or find a more sinister cast to actions which the lower court deemed innocent. *United States* v. *Nat'l. Ass'n. of Real Estate Boards,* 339 U.S. 485, 495-96 (1950). Even in antitrust cases in which the Government is the appellant, reviewing courts do not have the discretion to engage in the equivalent of a trial *de novo* of disputed facts *United States* v. *E. I. duPont de Nemours & Co.,* 351 U.S. 377, 381 (1956). As this Court stated in *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341 (1949):

> It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings

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Comptroller are necessarily the same in several parts of the briefs. In addition, it has been deemed appropriate to compare or contrast the arguments of plaintiff in the two cases. Thus sections I, III, IV, V, VI and IX of the Argument in the Comptroller's briefs are essentially identical in the two briefs. Reference is made to both cases in the brief in each case. No. 73-38 is referred to as the Washington case and No. 73-767 is referred to as the Connecticut case. References to plaintiff's briefs in these cases are similarly differentiated. Plaintiff's brief in 73-38 is referred to as "Pl. Wash. Br." and plaintiff's brief in 73-767 is referred to as "Pl. Conn. Br." References to plaintiff's brief without identification as "Wash." or "Conn." are references to the brief of plaintiff in the instant case.

> of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not "clearly erroneous."

The Court again reminded us of this basic rule several weeks ago when it stated in *United States* v. *General Dynamics Corp.*, slip opinion at 21 (No. 72-402, decided March 19, 1974):

> Finally, the Government contends that the factual underpinning of the District Court's opinion was not supported by the evidence contained in the record, and should be reevaluated by this Court. The findings and conclusions of the District Court are, of course, governed by the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals. The record in this case contains thousands of pages of transcript and hundreds of exhibits. Little purpose would be served by discussing in detail each of the Government's specific factual contentions. Suffice it to say that we find the controlling findings and conclusions contained in the District Court's careful and lengthy opinion to be supported by the evidence in the record and not clearly erroneous.

In spite of the unmistakable import of this Court's utterances on the subject, plaintiff seeks what is tantamount to a trial *de novo* in the nation's highest Court. There is no basis for this plea. The 293 findings of fact, upon which the District Court's opinion is based, are well grounded in the evidence submitted at trial and are therefore not clearly erroneous.

II. THE FINDINGS OF FACT OF THE DISTRICT COURT IN THIS CASE ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Relevant Geographic Market

At trial, plaintiff argued that nine separate Standard Metropolitan Statistical Areas in Connecticut are sections of the country in which the competitive effects of the merger should be analyzed. The District Court concluded, however, that plaintiff failed to carry its burden of proof with respect to all nine SMSA's. 362 F.Supp. 282. For purposes of this appeal, plaintiff has limited its arguments to two SMSA's, Bridgeport and New Haven, contending that both are banking markets and therefore relevant sections of the country. (Pl. Br. 34-43)

With the assistance of plaintiff's chief expert witness, Dr. Murphy, defendants demonstrated that neither the Bridgeport SMSA nor the New Haven SMSA is a banking market. During direct testimony, Dr. Murphy defined the relevant geographic market as "that area in which the decisions as to output and prices are affected by participants in the market." (App. 114) He confirmed that a firm can establish its prices only after surveying the behavior of its competitors in its service area. (App. 257) Using this definition, defendants showed that First New Haven and Connecticut National, like most Connecticut banks, do not establish the prices of their banking services solely on the basis of the competitive forces in their respective SMSA's, but on the basis of competition existing throughout their entire service areas. (Findings 70, 71) Since the service areas of both banks extend well beyond their respective SMSA's, competition found outside the SMSA is also considered before a final price is set. For this reason, the relevant

market must be broader than the Bridgeport SMSA or the New Haven SMSA.

Faced with the realities of how prices are determined, plaintiff might nevertheless have contended that the Bridgeport and New Haven SMSA's are banking markets by demonstrating that banks vary their prices or services within their service areas to reflect the differing degrees of competition encountered from one place to another. Insufficient proof, however, was offered on this point. Instead, defendants presented evidence showing that Connecticut banks price their services on a system-wide basis, i.e., a bank charges the same price for a particular service at all its branches. (App. 569, 402-403, 432) Moreover, plaintiff's expert testified that he had no evidence that banks in Connecticut vary their services within their branch systems in response to changes in the competitive climate. (App. 181-182)

We agree with plaintiff's observation that the SMSA concept can be a useful tool for banking market analysis but that its value "will vary from case to case." (Pl. Br. 41) According to plaintiff's chief expert witness, the SMSA was not developed by the Office of Management and Budget to be used in analyzing banking markets. (App. 262) The individual towns that constitute a SMSA are aggregated strictly on the basis of commuting patterns; the SMSA's delineation does not consider other important factors, such as competitive pressures, which are essential in defining banking markets. (App. 108) Thus, the SMSA can be employed only as a starting point, after which its boundaries must be expanded or contracted to take into account all relevant competitive influences and banking alternatives. This is particularly true in New

England, where competitive pressures exist over wide areas and metropolitan jurisdictions lack clear boundaries, with the result, according to one of plaintiff's experts, that inclusion of areas within a specified SMSA as a banking market, without further analysis, is purely arbitrary.

When additional analysis is performed, it is discovered that banking organizations in New England generally have offices and derive substantial deposits beyond the boundaries of the SMSA where their head offices are located. (App. 1995, 2004, 2010, 2016, 2226-2239, 2331; Finding 66) For example, only 57 percent of Connecticut National's deposits originate from towns in the Bridgeport SMSA, while about 88 percent comes from towns in which Connecticut National has branch offices. (App. 950, 1995) At the least, this would show the inadequacy of the Bridgeport SMSA as a banking market in this case. (Finding 65)

Assistance in determining the relevant geographic market can often be found in the "competitive reports" prepared by the banking agencies and the Department of Justice to advise the approving agency on the competitive aspects of the merger. In none of these competitive reports, all of which were introduced as evidence by the plaintiff, is this merger analyzed in terms of SMSA's. The Department of Justice examined the merger's impact on existing competition in terms of New Haven County and Fairfield County, which approximate the service areas of the two banks. For the purpose of assessing the impact on potential competition, the Department of Justice, like defendants, selected the town as the unit of analysis and the state as the relevant geographic market. (App. 1618, 348) Similarly, the Federal Deposit Insurance Cor-

poration failed to discuss the merger's competitive implications in any Connecticut SMSA, using instead the banks' service areas as the relevant geographic market. (App. 1627, 350) The Federal Reserve Board also failed to cite any particular SMSA. It is anomalous that plaintiff now contends that relevant markets should be examined which apparently did not exist at the time of the writing of the advisory opinions,[5] and, in view of the express statutory provisions requiring competitive reports, it is astonishing that plaintiff should argue before this Court that the reports are "rapidly prepared" and are "of little significance." (Pl. Br 39-40)

The Comptroller and the defendant banks argued at trial that New York City should be considered part of the relevant geographic market because banks located there actually transact business within and constantly search throughout Connecticut for available business. (App. 2566) The District Court declined to accept this contention but indicated that recognition should be given to the impact of the New York banks when assessing the benefits accruing from the merger. 362 F.Supp 283.

The approach taken by the District Court is entirely appropriate. Ample evidence records the great impact of New York City banks in the Connecticut banking market. Data compiled by a Special Master shortly be-

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[5] Plaintiff's principal expert witness, Dr. Murphy, was chief of economic research at the Federal Deposit Insurance Corporation at the time his division prepared the FDIC report on competitive factors in this case. (App. 112, 349-350) Had Dr. Murphy or his staff felt that certain SMSA's in Connecticut constituted relevant geographic markets, presumably the FDIC report to the Comptroller would have said so.

fore trial (App. 2331) showed that six banks in New York City obtained approximately $484 million in deposits[6] and over $381 million in commercial, industrial and mortgage loans from Connecticut customers.[7] These figures must be regarded as incomplete and considerably below the totals which would have been obtained had time and money permitted a more extensive survey of all the accounts held by said banks. Further, the Special Master's survey was confined to only six New York banks and therefore does not reveal what must surely be a significant amount of business derived in Connecticut by the many other banks located in New York City. (See generally, Finding 90 and App. 620-625)

This evidence, combined with a recognition of its incompleteness, compels the conclusion that New York banks engage heavily in competition for banking business in Connecticut. The deposit figure of $484 million is greater than the record deposits of each defendant and only slightly less than that of New Haven's Union Trust Company, which, at $533 million in deposits, is the state's third largest bank. As one expert witness observed, ". . . it is as if we were to introduce into [Connecticut's banking] structure a bank larger than all but the top three." (App. 623)

Since they are unable to branch across state lines, New York City banks resort to extensive advertising

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[6] The cited deposit figure does not include time and savings deposits originated in Connecticut by New York's largest bank, First National City Bank.

[7] The cited loan figure does not include any information on commercial and industrial loans originated in Connecticut by New York's fourth largest bank, Manufacturers Hanover Trust Company.

to reach individual and business customers in Connecticut. In Fairfield County, which is part of the New York television market, the influence of New York advertisers is especially strong inasmuch as only New York broadcasts may be received there.[8] The daily circulation of New York City newspapers in Fairfield County exceeds the circulation of Fairfield County's only morning daily. New York banks advertise heavily in both media, as well as in railroad stations for the benefit of commuters. (App. 567-568, 1144-1145)

Connecticut customers are also solicited by personal visits from traveling representatives of New York banks. A regular calling program is maintained by these banks in order to service present customers and to establish new ones. (App. 1156)

The activity of New York City banks in Connecticut was noted by the Comptroller of the Currency in his opinion approving the consolidation. The Comptroller was struck by the attractiveness of Connecticut as a source of business and by the lack of sizable banks, particularly in the southwestern part of the state, to serve adequately the needs of the area. Accordingly, he was not surprised to find New York banks canvassing this banking market from border to border (App. 2566)

The presence of New York City banks in the state is not without its impact on Connecticut bankers. As indicated earlier, most Connecticut banks, including

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[8] The Bridgeport, Stamford, Norwalk and Danbury area accounts for 4.1 per cent of television households in the New York television market. Accordingly, a television marketing concept—"area of dominant influence"—includes Fairfield County in the New York television market. (App. 567).

First New Haven and Connecticut National, establish a uniform price for their banking services only after considering the prices charged by other banks competing in their service areas. With New York City banks undeniably exerting competitive pressures in Connecticut, Connecticut banks must and do weigh the rates of their New York competitors when setting their own prices. (App. 568-569, 621, 624, 246, 257)

Thus, in determining the relevant geographic market, the District Court applied the teaching of the *Philadelphia Bank* case, 374 U.S. at 357. Since there was no area of competitive overlap between the two banks involved, the District Court sought the area in which the merger would have competitive impact and found it in the state. As the District Court found, the merger will create a new statewide bank to compete with the two present large statewide banks, and thus will have the effect of increasing competition on a statewide basis. The District Court gave careful consideration to all of the smaller areas suggested as relevant markets, analyzed the possibility of competitive impact in each area, and made meticulous findings that the merger would either have no effect or a procompetitive effect in each of the areas smaller than the whole state. The principal competitive impact was found to be in the statewide market and was found to be clearly procompetitive.

The Comptroller submits that plaintiff failed to prove that the Bridgeport and New Haven SMSA's are relevant markets or sections of the country and that the District Court's findings with respect to relevant section of the country are supported by substantial evidence.

B. The Relevant Line of Commerce

At trial, plaintiff contended that commercial banking is the line of commerce within which to assess the competitive impact of the merger. The District Court held that savings banks must be included because they furnish direct and substantial competition with commercial banks in the services provided to banking customers in Connecticut. 362 F.Supp. 280.

Plaintiff introduced no evidence at trial on the line of commerce issue, relying instead on this Court's opinions in *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), and *United States* v. *Phillipsburg National Bank,* 399 U.S. 350 (1970). In both cases the Court declared that commercial banking was the relevant line of commerce. Neither case, however, relieved the plaintiff from the burden of presenting proof on this issue in future bank merger cases. It would not have been appropriate to eliminate plaintiff's burden on this point, since competitive conditions invariably change from time to time, and a line of commerce that is relevant at one time and place may not be relevant a few years later in another place. This is especially true in Connecticut, where recent changes in state law have assured that savings banks and commercial banks will be even more competitive in the near future than they are now.

The Supreme Court's conclusions as to the proper line of commerce in *Philadelphia* and *Phillipsburg* were reached on the basis of the circumstances then existing in the geographic markets under examination. Had the evidence demonstrated, for example, that financial institutions other than commercial banks provided checking accounts, or were about to provide them, or acted as close substitutes for commercial

banks, the Court would surely have recognized competition when, in fact, competition existed[9] and arrived at a different conclusion. The Court's previous holdings as to the line of commerce are not, then, cast as invariable principles to be blindly adhered to in all future cases.[10] Rather, this Court's utterances are more accurately viewed as guidelines which are inapplicable where the weight of evidence demands a wider definition. As Judge Nixon stated in another bank merger case in which potential competition was also a much disputed issue:

> The Supreme Court in *United States* v. *Third National Bank in Nashville,* 390 U.S. 171, 88 S.Ct. 882, 19 L.Ed.2d 1015 (1968) said that the omission of the phrase "in any line of commerce" from section 5(B) of said Act [12 U.S.C. 1828(c)(5)(B)] evidenced no intention on the part of Congress to alter the traditional methods of defining relevant markets within which to appraise the anticompetitive effect of a merger, and agreed with the District Court in that case that commercial banking in Davidson County was the relevant market for appraising the merger in question therein. This Court finds that the above statement by the Supreme Court was an affirmation of the trial court's determination that, under the particular facts and circumstances of that case, commercial banking was the appropriate line of commerce

[9] *United States* v. *Continental Can Co.*, 378 U.S. 441, 458 (1964).

[10] Even Plaintiff's expert economist on banking markets indicated that the question of the relevant line of commerce in bank merger cases is not settled. Dr. Murphy stated that whether savings banks should be included in the line of commerce "depends on the merger in question." (App. 256) The same witness has written in a professional journal that the designation of commercial banking as the relevant line of commerce should be re-examined in light of evidence uncovered in the 1960's. *Infra* p. 49.

within which to measure the impact or anticompetitive effects, if any, of the proposed merger therein. This Court does not believe that the Supreme Court would disagree with this Court's opinion that commercial banks must not be placed in a distinct and separate category to the exclusion of any and all other financial institutions which actually are competing substantially with commercial banks in various important or integral activities within the relevant geographic market. This would be completely contrary to the intent and purpose of the Clayton Act and would be contradictory and contrary to many of the decided cases such as *United States* v. *Provident National Bank*, 280 F. Supp. 1, 9 (U.S.D.C.E.D.Penn. 1968). In that case, the Court considered the relevant line of commerce as including not just commercial banking, but other financial institutions (mutual and savings and associations), because they offered direct and meaningful competition to commercial banks. In reaching such a conclusion, the *Provident* Court relied upon the Supreme Court's ruling in *United States* v. *Continental Can Company*, 378, U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964). In the instant case, the same reason exists since commercial banks experience actual competition in Leflore County from other financial institutions which is actual, fierce, direct and meaningful.

United States v. *First National Bank of Jackson*, 301 F.Supp. 1161, 1180-1181 (S. D. Miss. 1969)

It should be noted that the Comptroller is not arguing that all financial institutions which compete with commercial banks should be included within the line of commerce in this case, even though five district courts[11] have deemed this proper in other cases.

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[11] *United States* v. *United Virginia Bankshares*, 347 F.Supp. 891, 894 (E.D.Va. 1972); *United States* v. *Idaho First National Bank*,

The Comptroller and defendant banks have not placed in the record substantial evidence revealing the extent of competition by savings and loan associations, credit unions, life insurance companies, the Farmers Home Administration, the Rural Electrification Administration, Federal Land Banks, mutual funds, U.S. Government marketable securities, etc.[12] Rather, defendants and the Comptroller, recognizing that inclusion of all financial institutions other than commercial banks would destroy the significance of plaintiff's concentration figures and diminish the chance of proving substantial lessening of competition under §7 of the Clayton Act,[13] have concentrated their attention upon one type of financial institution which offers the most "direct" and "meaningful"[14] competition to commercial banks in Connecticut: mutual savings banks.[15]

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315 F. Supp. 261, 267-268 (D. Idaho 1970); *United States* v. *First National Bank of Maryland*, 310 F. Supp. 157, 168 (D. Md. 1970); *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161, 1180-1181 (S. D. Miss. 1969); *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 153-162 (N. D. Cal. 1967).

[12] See *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 157-161, where competition from a large variety of financial institutions, including all of those listed above, was evaluated. After studying the extent of competition offered by these institutions to commercial banks, the three-judge court selected a broader line of commerce than commercial banking. Accordingly, the *Crocker* court felt that plaintiff's concentration figures, which were based only on commercial banking, had to undergo a "drastic modification". 277 F. Supp. at 162.

[13] *United States* v. *First National Bank of Maryland, supra*, 310 F.Supp. at 168.

[14] *United States* v. *First National Bank of Jackson, supra*, 301 F.Supp. at 1181.

[15] The selection of savings banks, rather than of all the financial institutions with which commercial banks compete, is the same

In addition to the "direct" and "meaningful" competition standard, reasonable interchangeability of products or services is an important factor in determining the scope of the relevant line of commerce. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). In *United States* v. *Continental Can Co.*, 378 U.S. 441, 457 (1964), the Supreme Court found reasonable interchangeability for, and sufficient inter-industry competition between, glass and metal containers to warrant treating them as a line of commerce.

This describes the state of competition that exists, or will exist in the near future, between savings banks and commercial banks in Connecticut. While there is not a complete "overlap" between the two institutions, most of their services are either identical or reasonably interchangeable and the competition between them is more than adequate to warrant treating their combined cluster of products and services as the same line of commerce.

Plaintiff's chief expert witness conceded that commercial banks must compete directly with savings banks in Connecticut for time and savings deposits, personal loans[16] and real estate loans. (App. 170, 1501-1502, Finding 45) These services comprise a very substantial part of a commercial bank's balance sheet.

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type of "workable compromise" urged in *Philadelphia* when this Court was attempting to delineate the geographic extent of the relevant market, 374 U.S. at 361.

[16] Savings banks in Connecticut are permitted to make installment loans to individuals for a wide variety of purposes, such as the purchase of automobiles and boats, home improvements, personal reasons, travel and, in general, the entire range of consumer lending. (App. 1068)

Connecticut National's loan portfolio as of December 31, 1971, reveals that 40.8 percent of the bank's loans were real estate mortgages and 38.2 per cent consisted of personal loans. Thus, as plaintiff's expert acknowledged, 79 percent of Connecticut National's loan portfolio is subject to direct competition from savings banks. (App. 170) Similarly, First New Haven's loan portfolio on the same date showed that 38 percent of the bank's loans were in mortgages and 35 percent in personal loans. Approximately 73 percent of First New Haven's loans, therefore, are in competition with savings banks. (App. 196-197, 1503-1504) In the area of deposits, approximately 51.8 percent and 50 percent of Connecticut National's and First New Haven's total deposits, respectively, are composed of time and savings deposits of individuals, partnerships and corporations ("IPC"), for which savings banks also compete wholeheartedly. Other commercial banks in the area have similar percentages of their loans and deposits for which savings banks compete directly. (App. 1141-1142, 1367)

While commercial loans have generally been considered to be exclusively within the province of commercial banks,[17] Connecticut's savings banks compete in this area as well. (App. 196-197) Direct competition exists between the two institutions for those commercial loans for which a mortgage is taken back on the commercial property as security. (App. 487) For many businessmen with small and medium-sized accounts, there may be no alternative to obtaining short-term

[17] Commercial loans comprise a relatively small part of Connecticut National's and First New Haven's loan portfolios, 19.4 per cent and 26 per cent respectively. (App. 170, 1501-1502, 1503-1504)

financing except through a mortgage on their commercial real estate.[18] (App. 637-638) For others, the ability of Connecticut savings banks to make "equity kicker" loans[19] is an important alternative to a loan from a commercial bank.

Thus, it appears that for both the smaller individual and business borrowers and depositors, commercial banks and savings banks are essentially the same. (App. 574-575, 638) Only trust customers and the larger corporations who require specialized corporate services would find savings banks not to be fully interchangeable.[20]

In view of the high degree of competition between savings banks and commercial banks, it is not surprising that the two also compete directly with each other for personnel. (App. 1072, 899)

Savings banks are also directly competitive with commercial banks for branch sites. (App. 1072-1073) Both defendants take into account the presence of savings banks when selecting locations for new branches. (App. 899-900, 453) Indeed, one of plaintiff's expert economists conceded that commercial banks must

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[18] An individual borrower who agrees to mortgage his commercial real estate in return for a loan may use the proceeds for *any* purpose, including a business purpose. (App. 1607)

[19] The lender in an equity kicker loan takes a share in the gross revenues of the business as security. When making a loan to an apartment house, for example, the savings bank may share in the rental income. The reservation of such an interest permits the savings bank to participate in the business success of the commercial enterprise. (App. 488)

[20] Nevertheless, a representative of a sizable New Haven corporation testified that his company had obtained a commercial mortgage loan from a savings bank in order to finance construction of a new office and warehouse. (App. 1272)

consider offices of savings banks when planning new branch locations. (App. 194)

As the District Court found, statistics gathered by the three federal bank regulatory agencies demonstrate a high degree of comparability between Connecticut commercial banks and savings banks in the areas of operating income, level of earnings, loans, income from securities and service charges. (App. 629, 2029, 2030) With some exceptions, an overview of the investment portfolios of commercial banks and savings banks in Connecticut reveals a marked degree of similarity in their portfolio behavior.[21] (App. 629-630)

As would be expected among broadly competitive institutions, the rate structure of commercial and savings banks is, for all intents and purposes, similar. While savings banks are permitted by regulation to pay a slightly higher rate of interest for savings deposits, testimony from savings bankers indicates that the difference is too inconsequential to cause the public to distinguish between the two institutions. (App. 1071-1072, 1021) Savings banks' rates on personal loans are the same or slightly less than that of commercial banks.

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[21] The assets held by savings banks are similar enough to those of commercial banks to permit the former to merge into the latter, a procedure which has occurred in Connecticut. (App. 469) In view of recent pronouncements by the Federal Home Loan Bank Board, it is quite possible that mergers between the two institutions will accelerate. On January 11, 1973, the FHLBB announced (38 Fed. Reg. 1334) the termination of its nine-year moratorium on the conversion of all insured thrift institutions from the mutual to the stock form. The termination of the moratorium was brought on, in part, by the desire of thrift institutions to switch to stock as an indicium of ownership. Assuming that some mutual savings banks in Connecticut do convert to the stock form, mergers with commercial banks, which are also of the stock form, will become considerably more simple and, in all likelihood, more frequent.

(App. 1009, 1174-1175) The two kinds of banks compete equally with respect to interest payments on certificates of deposit. (App. 164)

The attitude of federal and state bank regulatory agencies is also relevant. The Comptroller thinks it is unrealistic not to consider savings banks as competitors of commercial banks. Accordingly, the Comptroller requires that an applicant for a *de novo* branch or for a new national bank charter furnish a list of competing savings banks in the applicant's projected trade area, and a map on which area savings banks are located in order that the Comptroller's Office can determine the proximity of substantial competitors to the proposed branch of a new bank. The national bank examiner investigating the applicant's proposal must assess, in his written report, the degree of competition from savings banks. (App. 1174)

Similarly, the Connecticut State Banking Commission believes that savings banks are "formidable competitors" to commercial banks. The presence of savings banks is considered by the State Banking Department when applications for new commercial bank branches are being evaluated. (App. 1318)

Ironically, plaintiff recognizes that there is very substantial competition between savings and loan associations and commercial banks, in states where savings and loan associations are not on the verge of obtaining checking account authority. Plaintiff filed suit in Texas to prevent the merger of a commercial bank and a savings and loan association on the theory that substantial existing competition would be eliminated. *United States* v. *The Fort Worth National Corporation and Mutual Savings and Loan Assoc.*, CA-4-1827 (N.D. Tex., filed Sept. 14, 1971) (App. 2413) It seems

inconsistent for the plaintiff to claim in the case at bar that savings banks and commercial banks should not be considered within the same line of commerce.

In *Philadelphia,* this Court emphasized the unique nature of the checking account offered by commercial banks as one of the principal reasons for confining the line of commerce to commercial banking, 374 U.S. at 326, 356. The Connecticut legislature has authorized checking accounts for savings banks. Connecticut Public Act No. 73-195 (May 14, 1973). Inevitably, the two types of financial institutions will be drawn into even tighter competition than they were at the time of the trial.

In light of these developments since *Philadelphia* and *Phillipsburg,* reference should be made to an article published in 1971 by the *Journal of Bank Research* (App. 2316), in which plaintiff's expert on banking markets, Dr. Murphy, discussed the appropriate line of commerce for bank merger cases, stating:

> . . . increased competition among commercial banks and thrift institutions for savings type liabilities in the 1960's suggests that some reconsideration of the commercial bank product line specification may be in order, and this is especially important if mutual savings banks are successful in obtaining the demand deposit privilege in several of the states in which they are permitted to operate, and S & L's make use of the capability to make third-party transfers.

It is ironic and inconsistent for plaintiff to base its case on the vague possibility that the banks involved here might, in some remote future, be able to enter each other's service areas, and yet ask this Court to ignore the reality of present competition and the cer-

tain imminence of increased competition between these banks and savings banks. Logically, the Court must recognize the substantial degree of competition between savings banks and commercial banks in Connecticut. The Court must also consider the ample evidence establishing the certainty of increased competition between these two institutions in the near future. Such evidence shows that the District Court's conclusion as to the relevant line of commerce should be sustained.

In any event, it is essential to note that the findings of the District Court on inclusion of savings banks in the relevant line of commerce affect only the conclusions with respect to concentration ratios. The District Court's Findings and Conclusions of Law with respect to competition and potential competition were based on detailed examination and analysis of the facts involving commercial banks and did not rest on the court's view as to the line of commerce. Even if this Court were to disagree with the District Court as to the appropriate line of commerce in this case, that would not weaken the force or evidentiary support of the findings made by the District Court on other aspects of the case.

C. Absence of Actual Competition Between the Banks

Plaintiff is not appealing the District Court's conclusions on the degree of actual competition between the merging banks (Pl. Br. 4, n. 1), and therefore the case before this Court involves no issue of actual competition between the two banks.

At trial, plaintiff contended that the merger would eliminate some actual competition between the banks

in a four town area adjacent to Bridgeport and New Haven. (*Ibid*) The District Court rejected this contention after plaintiff's chief expert witness, Dr. Murphy, stated flatly that the four-town area did not constitute a banking market and therefore was not a section of the country for purposes of the Clayton Act. (App. 182-183) In addition, Dr. Murphy testified that this merger is essentially a "market extention merger" (App. 307), meaning that the merger is one between two firms that produce the same product but do so in separate geographic markets without direct competition. Cf. *United States* v. *First National Bank of Jackson, supra,* 301 F. Supp. at 1190.

Nevertheless, the District Court assumed *arguendo* that the four town area was a relevant section of the country within which to analyze the merger. 362 F. Supp. 286. Even under this assumption, the District Judge found no substantial lessening of competition. Defendants' offer to divest themselves of six branches in the four towns (Findings 10-12) as a condition to approval of the merger was determined to be demonstrably procompetitive. Before the merger, 74.0 percent of the deposits in the four towns was held by the three leading banks; after divestiture, only 55.5 percent of the deposits will be controlled by these banks. (App. 2003) Moreover, the divestiture will result in a net increase of four new banking alternatives, two of which will be the billion dollar Hartford banks, which are not now represented by branch offices in the four town area. As the District Court concluded, the effect of the consolidation and the accompanying divestiture will be an increase in actual competition which is not obtainable under any other foreseeable set of circumstances.

Since the elimination of actual competition is not an issue in this case, the question is simply whether the probable effect of the merger is to substantially lessen potential competition between the two banks.

D. Effective Barriers to Entry by Either Bank into the Other's Area.

Plaintiff's principal argument in this case is that the merger will eliminate the opportunity for the development of competition in the future between the two defendants. The potential for future competition will be realized, plaintiff argues, if one of the defendants enters the service area of the other by means of further *de novo* branching or through the establishment of a new bank in a community in which the other defendant operates. The District Court assumed the validity of plaintiff's "potential competition theory" in a regulated industry but rejected plaintiff's contentions as not supported by the evidence advanced at trial. 362 F. Supp. 286-287.

To determine whether substantial future competition will probably be eliminated, the District Court properly examined the barriers to entry faced by a firm not now in the market. Specifically, the court considered the obstacles confronting a move by Connecticut National into First New Haven's market area and a move by First New Haven into Connecticut National's market area. Since the barriers to entry were found to be high in each instance, neither bank was found to be a likely entrant into the other's trade area. Accordingly, neither bank can influence significantly existing competition in the other's market because market participants will not take the prospect of entry seriously.

See *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 531 (1973).

In Connecticut, the highest barrier of all, a statutory prohibition, prevents First New Haven and Connecticut National from entering each other's service area in any significant way by means of *de novo* branching. Connecticut's "home office protection law"[22] does not permit either bank to open a *de novo* branch in any city or town in which another commercial bank has its headquarters. Since both the City of New Haven and the City of Bridgeport serve as the headquarters of one or more commercial banks, both are "closed" to entry by banks headquartered elsewhere. Thus, it is legally impossible for First New Haven to branch into Bridgeport or for Connecticut National to branch into New Haven.

De novo branching into the suburbs of New Haven and Bridgeport confronts similar difficulties. As plaintiff's brief admits (Pl. Br. 8, n. 10), in the New Haven metropolitan area the towns of Orange, Woodbridge, Hamden, North Haven and North Branford are closed to *de novo* branching. In the Bridgeport metropolitan area, the suburban towns of Stratford, Fairfield, Trumbull, Shelton and Monroe are also closed. In short, most of the towns in each metropolitan area are barred to *de novo* branching by banks not headquartered therein.

These legal considerations conclusively determine that meaningful *de novo* branching by Connecticut National and First New Haven into each other's service areas is beyond the realm of reasonable probability.

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[22] Conn. Gen. Stat. 36-59; 12 U.S.C. 36(c)(1).

In addition, testimony from a representative of the Comptroller indicated that the Comptroller's present policy would not permit significant *de novo* branch penetration by Connecticut National into First New Haven's market, or vice versa.[23] 362 F. Supp. at 287; Finding 34.

Legal barriers also prevent the defendant banks from seriously considering entry into the other's home office area by chartering a new bank. Under the procedure proposed by plaintiff, Connecticut National in Bridgeport would form a holding company, charter a

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[23] The Comptroller's policy limits *de novo* branching into major markets in Connecticut by a national bank not already situated in that market. This policy is an offspring of the Comptroller's decision in 1965 to ban all new charters for national banks in those markets in order to allow sufficient time for nine national banks chartered immediately prior to 1965 to achieve an adequate deposit base and satisfactory earnings. (App. 1106-1108, 1110-1112, 2573) This policy is still is effect (App. 1107), and objective evidence shows that it has been followed in 27 of 28 instances since 1965. (App. 1107) Cf. Findings 13, 14 and 15, 362 F.Supp. 243 with respect to the Comptroller's responsibility to insure both competition and stability in the national banking system.

Even if this policy were not in effect, the addition of a new branch to a town in which either defendant is located would, in most instances, reduce the population per banking office to a level well below the statewide average, suggesting that these towns are not sufficiently attractive economically to lure an additional entrant and, more importantly, that regulatory approval would not be forthcoming. (App. 1116-1118; Findings 138, 140, 141).

Although the Comptroller severely limits new charters and *de novo* branching in the manner described, the Comptroller does not place similar limitations on mergers. The consummation of a merger does not increase the number of banks or branches in a particular market and thus may increase competition without endangering existing banks. In contrast, the chartering of a new bank or the addition of a branch by an outside entrant adds another competitor to the market, creating a threat to the profitability of banks recently organized. (App. 1112)

new bank in New Haven and then have the holding company acquire the new bank. Likewise, First New Haven would secure a new bank charter in Bridgeport and then acquire the new bank by means of a newly formed holding company. This means of entry would, in effect, circumvent Connecticut's prohibition against branching into towns where the headquarters of a commercial bank is located and, in the minds of Connecticut bankers, would certainly be challenged in court.[24] Not surprisingly, no bank or bank holding company in Connecticut has ever used this avenue to enter a closed town. Further, it is highly unlikely that regulatory authorities will grant approval for the organization of a new bank under these circumstances.[25]

E. Absence of Economic Incentives for Either Bank To Enter the Service Area of the Other De Novo or by Foothold Entry, or To Compete Against Each Other in New Areas

Plaintiff argues that First New Haven and/or Connecticut National might move into the other's service areas absent the merger. This assumes that either or both banks has the incentive to do so. The District Court rejected this contention, finding, *inter alia*, that

[24] Connecticut's state banking commissioner testified that entry by an out of town bank into a closed town by means of a holding company would result in "a bugle call of fury from the banks in the area and lawsuits woud be flying all over the the place." (App. 1317)

[25] Connecticut's state banking commissioner stated flatly at trial that it was against the policy of the state banking commission to permit the organization of a new state-chartered bank for the purpose of selling it to a holding company. (App. 1312, 1314) A representative of the Comptroller of the Currency testified that since 1965 the Comptroller has, with one exception, adhered to a policy of refusing to grant any new national bank charters in major banking markets in Connecticut, including Bridgeport and New Haven. (App. 1106-1107, 2573)

the economies of both Bridgeport and New Haven were sluggish and not conducive to entry by outsiders. (Findings 121, 124, 362 F. Supp. 257 and n. 18)

1. Entry by First New Haven into Bridgeport.

Objective evidence demonstrates that entry into Bridgeport by means of *de novo* branching or chartering a new bank is not attractive to an outsider. Although the population of Connecticut grew 19 percent between 1960 and 1970, population growth in Bridgeport remained static. Total retail sales made in Bridgeport increased only 8.5 percent during the period 1958 to 1967, in contrast to the statewide increase of 62.5 percent. Employment of Bridgeport residents in Bridgeport increased by only 3.4 percent between 1960 and 1970, as compared to an increase in employment of state residents by 25 percent. Manufacturing employment in Bridgeport increased 6 percent from 1963 to 1967, in contrast to a 14.1 percent increase in such employment in Connecticut. (App. 2202, 782-784) In these circumstances a new entrant could not reasonably expect new deposits. (App. 784)

Another objective factor which discourages entry into Bridgeport by *de novo* branching or chartering is the presence there of four of the state's ten largest commercial banks. Clearly, it would be difficult for a new entrant to challenge effectively such formidable competitors without a local deposit base. (App. 785)

Realizing that objective facts make it unrealistic for First New Haven to enter Bridgeport through *de novo* branching or chartering a new bank, plaintiff contends that First New Haven should have sought an acquisition in Bridgeport involving a bank smaller than Con-

necticut National. However, in order to prove that a substantial lessening of competition is reasonably probable, plaintiff must show it is reasonably probable that other alternatives could be purchased. This would not be an inordinately difficult burden for the plaintiff, and it would assist in removing to some degree the air of speculation that pervades the theory of potential competition.[26]

Without furnishing any evidence to show that such acquisitions could in reasonable probability be undertaken, or even that they are realistic possibilities, plaintiff contends that James Staples & Co. and Lafayette Bank & Trust Co. would be better merger partners in Bridgeport for First New Haven. (Pl. Br. 50 & n. 60)[27] The objective evidence characterizing James Staples & Co., a private banker with only one office and barely $2.5 million in deposits, is sufficient by itself to show that no commercial bank desiring to enter Bridgeport could consider acquiring that firm. The other option, Layafette Bank & Trust Co., is so large that First New Haven could not afford the purchase. Lafayette, with $52 million in deposits, represents the only "small"

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[26] Plaintiff continues to insist that Mr. Justice Marshall's concurring opinion in *Falstaff* virtually relieves plaintiff of any burden of proof beyond simply announcing the "toehold" theory and listing acquisitions. (Pl. Br. 51) As the Comptroller has previously pointed out to this Court (Comptroller's Motion to Affirm at 14 & n. 7), nothing in Mr. Justice Marshall's opinion can be construed to lighten plaintiff's burden on this point.

[27] The plaintiff's brief also mentioned the Bank of Stratford as a possible "toehold" acquisition. This contention was not advanced during trial, nor was it mentioned in plaintiff's Jurisdictional Statement. But even if it were to be considered, the Bank of Stratford is too distant from downtown Bridgeport to allow the merged bank to compete effectively with the large statewide banks located there. See Finding 122, 362 F.Supp. at 257.

institution in a community of giant banks and thus is in a position to exact a large premium far beyond the ability of First New Haven to pay. Nagged by a 14 per cent decline in earnings for the six months ended June 30, 1973, over a comparable period in 1972, First New Haven must concentrate on reducing deficits in the operation of nine of its 22 branches before fantasizing about acquiring a bank the size of Lafayette in Bridgeport. (App. 1037)

2. Entry by Connecticut National into New Haven.

Objective evidence shows that New Haven is less attractive for entry than Bridgeport. (App. 791) Whereas retail sales in Connecticut grew by 62.5 per cent between 1958 and 1967, New Haven experienced only a 17.0 per cent increase. Wholesale sales between 1958 and 1967 in Connecticut grew by 58 per cent, but by only 25.6 per cent in New Haven. Total employment of New Haven residents in New Haven decreased 9.5 per cent between 1960 and 1970, while Connecticut employment of Connecticut residents advanced 25 per cent. Manufacturing employment decreased 25.3 per cent in New Haven between 1963 and 1967, while Connecticut observed a 14.1 per cent increase. Value added by manufacture between 1963 and 1967 declined 9.3 per cent in New Haven, while it increased 42 per cent in Connecticut. Finally, New Haven's population between 1960 and 1970 decreased 9.4 per cent, while Connecticut's population increased 19.6 per cent. (App. 789, 2203)

In addition to evaluating the New Haven economy, a potential entrant would analyze the quality of competition with which he would have to contend. Five of the largest commercial banks in the state operate in

New Haven. The presence of so many competitive banks would give pause to any outsider contemplating entry and would therefore make the prospect of entry less than reasonably probable. (App. 792)

Despite these inhibitions to outside entrants, plaintiff argues that Connecticut National is sufficiently strong to undertake branch expansion into the few towns around New Haven not now closed by Connecticut's "Home Office Protection Law," as well as into other parts of First New Haven's service area and beyond. The conclusion of the District Court was expressly to the contrary, 362 F. Supp. 286, and the supporting evidence is ample.

After a spurt in the early 1960's, Connecticut National's branch expansion slowed dramatically in subsequent years upon management's realization that *de novo* branching was becoming prohibitively expensive.[28] In fact, from 1965 to 1970, Connecticut National had the lowest rate of increase in number of branches among the nine largest commercial banks headquartered in Connecticut. (App. 591, 2026) As a result of this slowdown, the bank's profitability in terms of return on investment increased by 30 per cent. (App. 953) In addition, Connecticut National's ratio of loans to capital is considered "weak" under the guidelines of the Comptroller of the Currency (App. 444-445), indicating (1) that the bank would have difficulty raising additional equity or debt capital for branch expansion and (2) that the necessary approval from the Comptroller's Office for further investment in fixed

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[28] The profitability of Connecticut National's offices opened since 1960 was found in 1971 to be 26 per cent less than the overall profitability of the bank. (App. 953, 450)

assets is not probable.[29] Connecticut National ranks eighth among the ten largest commercial banks in Connecticut in terms of its ratio of loans to capital. It ranks ninth in terms of its ratio of capital to assets. (App. 957-959; Finding 29)

These facts show that Connecticut National is not the powerful competitive force that plaintiff alleges. Clearly, Connecticut National is not "an aggressive, well equipped and well financed corporation . . . waiting anxiously to enter. . . ." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964). For this reason, it cannot be said to have any significant influence in markets in which it is not a participant. *Falstaff, supra,* 410 U.S. at 532-533.

Plaintiff argues that Connecticut National would have generated fewer anticompetitive effects had it merged with a less sizeable bank in the New Haven SMSA, specifically, with a bank in a suburban town like North Haven, Hamden, North Branford or Woodbridge. (Finding 186, 362 F.Supp. 265) No evidence,

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[29] As the District Court found (Findings 172-173, 362 F. Supp. 263), both federal law and the Comptroller's implementing regulations severely inhibit, if not prevent, Connecticut National from seriously considering significant expansion by de novo branching in the foreseeable future. Federal banking law, 12 U.S.C. 371d limits the investment by a national bank in "bank premises" (the bank's head office and its branches) to the equivalent of 100 per cent of the bank's capital stock. Connecticut National has utilized this entire amount and pursuant to the Comptoller's regulations at 12 C.F.R. 7.3100 (e), must apply to the Comptroller for permission to make future investments in fixed assets. To date, the Comptroller has granted one variance to Connecticut National and for each new branch in the future another variance must be requested. "Reasonable need" for each variance must be shown. (App. 953-954, 955-957)

however, was advanced to indicate that any of the suggested "toehold" alternatives was available. Since Connecticut National has encountered frequent refusals to sell from small banks in the past (App. 499), it is purely speculative for plaintiff to suggest that such an approach could be followed.

The problem of availability aside, no toehold acquisitions exist in the entire New Haven SMSA that would provide effective entry into New Haven. The Woodbridge Bank and Trust Company, to which plaintiff devoted considerable attention at trial, is too far removed from New Haven's core to allow Connecticut National to compete effectively for the business it would need to pay for the acquisition. In addition, future growth of the Woodbridge bank will be inhibited by geographic barriers surrounding its present location and by the small amount of commercial business available in Woodbridge. (App. 443, 575, 904-905, 1038)

Acquisition of small banks in North Branford, North Haven and Hamden would also place Connecticut National too far from downtown New Haven to have any beneficial competitive impact. The large number of corporations and law firms, from which trust business is obtained, could not be served by acquisition of a single office bank in any of these distant towns. (App. 576, 1038-1039) Further Connecticut National would find itself confined in each of the suggested toeholds, unable to branch further within the town in which the toehold is located, or into New Haven, or into any other closed towns bordering the City. (App. 229, 234, 443) All these circumstances underscore management's serious doubts about the profitability of any of these acquisitions. (App. 443)

Finally, the likelihood of Connecticut National's making an acquisition of any nature, absent the subject consolidation, is severely diminished by its experience in merging Atlantic National Bank in Stamford in 1970. The bank's stockholders are still suffering from a 10 per cent dilution in their earnings per share arising from the premium of $1.2 million paid to Atlantic to consummate the merger. Stockholder support for further acquisitions by merger is in doubt. (App. 965-966)

3. Entry by either bank into the other's home town by means of the holding company route

Plaintiff contends that the consolidation will eliminate the prospect for defendants' coming into competition with each other in the event one should decide to (a) form a holding company, (b) charter a new bank in the other's home town, and (c) have the holding company acquire the stock of the new bank. As previously discussed,[30] formidable legal and regulatory barriers prevent defendants from considering the "holding company route", as this procedure is known. Moreover, defendants have no economic incentive to invade the other's market in this manner.

The formation of a new holding company and the chartering of a new bank would require approximately $2,000,000 in capital funds.[31] Start-up and promotional

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[30] *Supra*, pp. 53-55.

[31] Before either defendant may organize a holding company and acquire 25 per cent or more of the stock of a bank, permission must be obtained from at least two government agencies. Under 12 U.S.C. 1842(a), an acquisition of this nature must receive the approval of the Board of Governors of the Federal Reserve System. However, the Board may give its approval only if the relevant

expenses would bring the figure to $2,500,000 for one office. If several additional offices were established to place the new bank in a truly competitive posture, approximately $750,000 would have to be budgeted as well. Neither bank can afford this kind of money on a venture which may be subject to legal challenge and which has never been attempted in Connecticut. (App. 960)

Assuming, *arguendo,* that defendants had ample capital available for the creation of a holding company and the making of acquisitions, there are many other investments which would be more rewarding and less risky legally than the chartering of a new bank in a closed town. Pursuant to the Bank Holding Company Act Amendments of 1970, 12 U.S.C. 1841, *et seq.,* the Federal Reserve Board has approved for investment by bank holding companies approximately ten activities which the Board considers ". . . to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 C.F.R. 225.4 (1973) Significantly, the holding companies of the two large Hartford banks have chosen to invest in the Board's permissible activities rather than to charter a new bank within the state. (App. 778-779, 963-964) Moreover, plaintiff made no showing that the "holding

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bank supervisory agency approves. Thus, pursuant to 12 U.S.C. 1842(b), if the holding company wished to acquire a new national bank, the Comptroller of the Currency must approve the transaction before the Board could act; similarly, if the holding company wished to acquire a state bank, the state supervisory authority would have to approve before the Board could proceed.

All of this assumes that state or federal authorities would be willing to charter a new bank so that it could be acquired by an out-of-town holding company. As previously indicated, *supra,* pp. 53-55 & n. 25, this is highly unlikely.

company route" is economically as attractive as legally permissible activities.

4. Entry by defendants into new areas

The preceding discussion showed there is no economic incentive for either defendant to enter the other's existing service area by the various means plaintiff has proposed. There is also little or no economic incentive for defendants to enter towns not now served by either bank.

Defendants showed that most towns where neither bank has offices are not sufficiently attractive economically to induce one new entry, and certainly would not attract both.

At the time of the trial, there were 136 towns in Connecticut where neither bank had offices. According to the District Court's findings, 103 were "open" to *de novo* branching and 33 were "closed" by State law. Of the 103 open towns, approximately 40 had no commercial bank because of insufficient population. (Finding 136) Since even a single branch would not be very profitable in these rural areas, it is most unlikely that *two* outside competitors would consider entering or that regulatory authorities would grant permission. (App. 1116, 1211)

The remaining 65 odd open towns were examined one by one during the trial. (App. 1116-1119, 1163-1172, 1210-1211) The testimony showed that the economic base of many of the towns, as represented by the town's population per banking office, is not strong enough to make a new entrant profitable within a reasonable period of time. Those towns whose economy could sustain one additional branch would not be able

to support two branches. Therefore, it is highly unlikely that both defendants would consider entering these towns, or that regulatory approval would be forthcoming.

Even if a town had a sufficiently high population per banking office ratio to accommodate two new branches, defendants may not be the two most likely entrants. As the District Court found on the basis of Dr. Peck's objective analysis, neither Connecticut National nor First New Haven is the most likely entrant in any open town in the state. (Finding 108; App. 810-811, 2033) It is impossible, therefore, to conclude that the merger eliminates substantial potential competition anywhere in Connecticut.

5. Subjective evidence of bank expansion plans

The District Court's decision is based primarily upon objective evidence.[32] The lower court did not, however, completely ignore the testimony of bank officers, even though plaintiff had urged that subjective evidence of this kind is unreliable. (Pl. Br. 54, n. 67) The court gave credence to bankers' testimony indicating that extensive *de novo* branching, the "holding company route" and the acquisition of certain "toehold" banks specified by plaintiff were either financially impossible or competitively unrealistic. 362 F.Supp. 287.

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[32] The District Judge appears to have relied mainly on the purely objective analysis of potential competition undertaken by Dr. Merton Peck, Chairman of the Economics Department of Yale University. See Findings 95-144. The testimony of Dr. Charles J. Stokes, Chairman of the Economics Department of University of Bridgeport, was another important factor in the court's decision.

The lower court's limited reliance upon the testimony of bank officials is consistent with the holdings of this Court. In *International Shoe* v. *FTC,* 280 U.S. 291 (1930), the Court relied to a considerable degree on subjective evidence in reversing the Federal Trade Commission's ruling that a stock acquisition violated § 7 of the Clayton Act. The Court said at p. 299:

> In addition to the circumstances already cited, the officers of the International testified categorically that there was in fact no substantial competition between the companies in respect of these shoes, but that at most competition was incidental and so imperceptible that it could not be located. The existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the business which they have carried on, assert that there was no real competition in respect of the particular product, their testimony is to be weighed like that in respect of other matters of fact. And since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted.

Recently, in Falstaff, *supra,* the Court stated that while objective evidence must continue to play an important part in the decision of the trier of fact, the testimony of company officials about the actual intentions of the company is not irrelevant nor to be looked upon with suspicion. 410 U.S. 534-535.

The Comptroller submits, therefore, that the District Court acted properly in giving some weight, albeit not conclusive weight, to the testimony of bank officers on the practicality of further *de novo* branching, use of the "holding company route" and the making of certain toehold acquisitions as alternatives to this merger.

F. Increased Competitive Vigor Resulting from the Merger.

This merger will permit the combined bank to compete on a statewide level with the billion dollar Hartford National Bank and Connecticut Bank and Trust Company. As locally oriented banks (App. 1113), defendants do not, in the opinion of the Comptroller's office, have the capacity to challenge the Hartford banks without the benefits of this merger.[33] (App. 1241) With the merger, however, the combined bank will have sufficient capital to invest in efforts to enter Hartford and New London, both of which are among the most highly concentrated cities in the state. (Findings 237, 240; App. 513-514, 819-820, 923-924)

The creation of another bank with the ability to go statewide would inject a measure of balance into a state banking structure which is woefully lopsided in favor of the two large Hartford banks and New York City banks (App. 1115). The Comptroller believes a healthier banking structure in Connecticut would consist of four or five statewide banks, each with its headquarters in a major population center. The presence of four or five substantial alternatives in each metropolitan area would give the consumer truly meaningful choices among which to make comparisons. (App. 614, 616) No net decrease in the number of smaller banks in the State would be necessary and their profitability would not be impaired. Previous experience in-

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[33] For example, Connecticut National, the largest of the two merging banks, would find it virtually impossible to enter Hartford by means of a toehold acquisition. The extremely low price earnings ratio of its stock would force Connecticut National to offer more of its shares than it could afford in order to effect the transaction. (App. 438-439) At the time of trial, there was only one bank among Connecticut's ten largest commercial banks with a price-earnings ratio lower than Connecticut National. (App. 958-959; Finding 180)

dicates that investors' clamor for new state and national bank charters will not abate as a result of increased competition among the five largest banks in the state. (App. 631-632)

Approval of the consolidation will slow the accelerating dominance of the state by the two large Hartford banks.[34] Moreover, in the opinion of a commercial banker who competes with both defendants, disapproval of the merger will assure the overpowering position of the Hartford banks. (App. 1162) The merger provides an excellent opportunity to prevent the evolution of a near oligopoly controlled by the Hartford banks.

G. Benefits to the Public Interest in Meeting the Needs and Convenience of the Community Through the Merger

The Bank Merger Act of 1966, 12 U.S.C. 1828(c)(5), provides an affirmative defense to a bank merger otherwise prohibited by § 7, *United States* v. *First City National Bank of Houston*, 386 U.S. 361, 363 (1967). Such a merger may be approved where the anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

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[34] The combined share of all deposits in Connecticut commercial banks held by the two Hartford banks has steadily increased from 34.5 per cent in 1959 to 39.2 per cent in 1970, while the share of such deposits held by the next six largest banks combined during the same period experienced a net increase of 1.2 per cent from 35.8 per cent to 37.0 per cent. (App. 2023) Since 1961, Hartford National has completed four mergers, Connecticut Bank and Trust has had five, and the State's third largest commercial bank, Union Trust Co., has had one. Collectively, they have increased concentration of banking resources in Connecticut by 5.4 per cent. (App. 312-314; 1553; Finding 151) No other bank experienced as many mergers in this period as Hartford National and Connecticut Bank and Trust Co. (App. 346)

The District Court weighed the benefits accruing to the community assuming *arguendo* that the violations alleged in the complaint were proved. The court's finding that the assumed anticompetitive effects are clearly outweighed by its beneficial impact on the community is amply supported by the record and constitutes an independent ground for affirmance of the judgment below.

The District Court's findings on convenience and needs cover six full pages of the Federal Supplement. 362 F.Supp. 272-278. Because a detailed discussion of each finding and the evidentiary support therefor will unduly lengthen this brief, we refer the Court to the findings themselves and provide only a brief summary, with particular emphasis on how the merger is "likely to benefit all seekers of banking services in the community." *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 372 (1970).

As suggested earlier in this brief, *supra*, pp. 67-68, the merger will assist materially in the establishment of a more competitive banking structure in Connecticut. Clearly, the entire banking public stands to benefit from the creation of a financial institution with the capability of competing against the two large Hartford banks everywhere in the State. As the Comptroller's regional representative testified, the merger will make available a broader range of banking services to the public in general, including the housewife, the small businessman-proprietor, Connecticut towns and political subdivisions, and corporate customers. (App. 1115)

The public at large in the four town area (Milford, Orange, Ansonia and Derby) will reap special divi-

dends from the merger. As a result of the proposed divestiture of six of defendants' branches, the four-town area will gain at least three new entrants, including both of the big Hartford banks, and possibly six. The increased competitive atmosphere will benefit all those living in the area. (Finding 236)

In addition to the general benefits of added competition that will accrue to the entire public, certain advantages of the merger will be realized by specific segments of the population, large and small. Since plaintiff's brief concedes (Pl. Br. 69) that large customers (e.g., large corporate customers) will benefit substantially from the merger through the availability of higher lending limits, more sophisticated computer and international services, new corporate and municipal financing services and more adequate trust services, we will concentrate on benefits to smaller customers.

Several local businessmen testified that there is a need for more sophisticated computer services in the New Haven area. (App. 1258-1259, 1277-1279, 1296-1297) One witness asserted that the benefits of a more sophisticated computer operation are felt by members of the public who patronize businesses seeking these services. (App. 425) Thus, the advantages of a bank's computers inure not only to the businessman but also flow to the businessman's individual customers through faster and more efficient service.

A dramatic example illustrates this point. A representative of the Knights of Columbus, a New Haven fraternal order engaged in the sale of insurance policies, testified that lack of adequate computer facilities in New Haven had brought to a halt the development of a pre-authorized check plan which would benefit

640,000 customers, including 15,000 from Connecticut, who pay their insurance premiums on a monthly basis. Under this plan, a policyholder authorizes K of C to deposit a draft on his checking account once a month at the bank to pay the premium. This procedure not only reduces the number of bills K of C must place in the mail, but also protects the customer by preventing a lapse in his insurance coverage, a factor which has caused K of C increasing concern. Of course, the plan will be more convenient to a customer who does not have to make out a check each month or purchase the necessary postage to mail it in.

Despite these clear advantages to the customer, the pre-authorized check plan has not been implemented because computer facilities are not available to pre-encode each draft. Pre-encoding is a condition precedent for acceptance of the draft for clearance by the local clearinghouse system or Federal Reserve Bank. The merged bank is expected to offer the necessary computer system so that the plan can be extended to all 640,000 K of C policyholders. (App. 1275, 1277-1279, 1281; Finding 270)

Small businesses will also benefit from expanded computer services offered by the merged bank. During cross-examination by plaintiff, the president of Connecticut National testified:

> A. Well, this is the kind of thing we want to do for small businesses. We want to set up a financial counseling system for small companies to help them, which is not presently being done, which involves certain computer application we don't have now. We want to do forecasting profit planning, cash flow forecasting, and we think there's quite a market here with small business companies.

Q. You think the market is substantial in this?
A. Yes. (App. 529).

Another specific instance in which a higher lending limit would benefit the public at large involves general contractors in Connecticut who need interim financing for "turnkey" construction projects, for which the contractor is not paid until the work is completed. Approximately 85 percent of such projects have been public housing projects, including six or seven in New Haven alone within the last three years. Most "turnkey" projects require a minimum of $2 million, a sum which is beyond First New Haven's "prudent" lending limit of $1.7 million. The merged bank, with a legal lending limit of $5.1 million and a "prudent" lending limit of $4.0 million, will be able to participate more extensively in providing interim financing for these projects, which benefit the entire community by providing housing for low income families and assisting urban areas in eradicating slums. (App. 1257-1258)

The presence of a bank with an adequate lending limit may have a significant impact on the degree to which a bank can make small personal and instalment loans. As the testimony and the Master's Report (App. 2331) amply demonstrate, many Connecticut corporations must obtain their loans from out of state banks because of inadequate lending limits locally. As a condition of the loan, the borrowing corporation is required to keep on deposit at the out of state lending institution a "compensating balance" equivalent to 10 per cent to 20 per cent of the loan. If larger lending limits were available at local banks, corporate borrowers would borrow locally rather than out of state (Findings 245, 248, 252, 255), and would there-

fore place their compensating balances locally. Compensating balances now held by out of state banks would be repatriated to Connecticut banks, where these funds could be used to make additional corporate loans, personal loans to individuals, and retail instalment loans. In this way, an increase in lending limits makes more funds available not only to businesses but also to small customers. One witness, asked to describe the benefits of larger lending limits to various groups of customers, testified. (App. 1042-1043):

> This would mean added jobs for the local residents; it would mean higher disposable personal income, increased retail sales. It would boost the local economies considerably.

Another witness, using objective figures, testified that an increase in loans to large corporations would not adversely affect the amount of funds available at Connecticut National for small borrowers. This is because large borrowers would keep on deposit more in compensating balances than they do now. Moreover, it would be contrary to Connecticut National's lending practices to reduce its loans to small borrowers inasmuch as the large percentage of the bank's commercial loans are made to small businesses. Indeed, the average commercial loan, outside the bank's 100 largest loans, is only $6,800. (App. 545-546)

Thus, there is substantial evidence in the record to support the District Court's finding (Finding 260) that higher lending limits will assist the combined bank in making more lendable funds available to smaller borrowers.[35]

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[35] Plaintiff disagrees with Finding 260. (Pl. Br. 70, n. 83) Since, however, the plaintiff does not disagree to the extent of labeling

All seekers of banking services, large or small, are affected by the competence of bank personnel. If bank personnel are responsive, objective or skilled, they are more apt to accommodate the needs of the entire community. As the District Court found, the size of the bank is an important factor in attracting highly qualified personnel. (Findings 289-291)

The District Judge, who displayed an intense interest in the merger's impact on the "small man", questioned a competitor of the merged bank about the degree to which personalized service to small customers disappears as a bank grows larger. The witness indicated (App. 426-427) that the small customer would probably be better off dealing with a large bank, where the turnover in personnel is less likely to mean an abrupt change in lending policy towards small customers. According to the witness:

> Well, the—if—to answer your question another way: if you got a small man who'se developed his moral character relationship with his banker and the bank is a small bank or a large bank, fine and dandy. Mr. Jones knows Mr. Smith, and he is good for a thousand dollars or he's good for five thousand dollars for 90 days, whatever the case may be, but when that individual's sick or retires or dies, it's his successor who has the lending limit and makes the judgment. Now, he may be an entirely different breed of cat, and this happens. A change of personnel will change the activity or development of a given branch, just like a man-

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the Finding "clearly erroneous", the Finding is not open to review by this Court. Fed. R. Civ. P. 52(a) and cases herein cited at pp. 31-32. Plaintiff had the opportunity to cross examine both witnesses who gave testimony on this subject, and did so in at least one instance (App. 1064-1065), but evidently failed to convince the District Court.

ager of a bank—the larger the bank, the less opportunity there is to change the character of the bank, because it is built up by people, no one individual runs a bank, it's a group of people.

But a small bank, it's usually a one-man shop.

Because plaintiff looks solely at competition, plaintiff takes too narrow a view of the ways in which a bank merger can serve the needs of the community. To suggest that the improved municipal financing and trust services resulting from this merger are benefits accruing only to large customers misapprehends the interaction between the bank, its customer and the general public. It is inconceivable, for example, that increased services to municipalities, such as the marketing of short term debt instruments, acting as certifying and paying agents for bond issues, bidding for large denomination certificates of deposit and financial counseling, do not redound to the benefit of all citizens of municipalities served by the bank. Surely, more than the municipal corporation benefits—each citizen benefits as well. Similarly, it is highly implausible that only large corporations receive the advantages of a well managed pension fund supervised by a sophisticated bank trust department; clearly, the corporation's hundreds and sometimes thousands of employees who contribute to the pension plan are direct beneficiaries of all the skill which the combined bank can muster in this area. The affirmative defense in the Bank Merger Act intended to give full recognition to these broad-based benefits.

Plaintiff's argument (Pl. Br. 69), that few benefits to the average seeker of banking services will result from this merger, is not sustained by the record. The evidence demonstrates that all Connecticut citizens will

gain from the increased competition produced by the better banking structure that will evolve from this merger. The evidence also shows that large groups of individuals will reap specific additional advantages from the merger. In short, the merger's alleged anti-competitive effect are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

III. PLAINTIFF'S THEORY OF POTENTIAL COMPETITION AND ECONOMIC ANALYSIS ARE ERRONEOUS.

A. Potential Competition Means Competition Which Is Probable and Imminent, Not Merely Possible.

Plaintiff's arguments in both of the companion anti-trust bank cases before the Court rests upon the assertion that each of the mergers will eliminate "potential competition" and thereby violate § 7. The meaning of the concept of "potential competition" is fundamental to plaintiff's cases. However, when plaintiff's usage of this term is analyzed in the light of the meaning given to it by the opinions of this Court it will be apparent that plaintiff is attempting to use "potential competition" in an entirely different sense than the Court has used the concept and in a way that this Court has said does not come within the scope of § 7.

There are only about half a dozen cases in this Court in which the potential competition concept has been referred to (Pl. Br. 29). These cases have vastly different factual backgrounds and therefore require individual examination.

Apparently the first case in which this idea appeared in an opinion of this Court was *U.S.* v. *El Paso Natural Gas Co.*, 376 U.S. 651. This was a suit in which El Paso

was charged with violation of § 7 by acquisition of Pacific Northwest Pipeline Co. El Paso was the sole out of state supplier of natural gas to southern California. Pacific Northwest attempted to enter the market over a period of years. First it attempted to make arrangements to distribute gas in southern California through Pacific Gas & Electric. This effect was aborted when El Paso made arrangements to take the Pacific Northwest gas. Pacific Northwest then reported to its stockholders that the agreement with El Paso "means that El Paso's California market will be protected against future competition. . ." Later Pacific Northwest reached an agreement to supply gas to Southern California Edison Co. Thereafter El Paso lowered its price to Edison and Edison terminated its agreement with Pacific Northwest and made an agreement with El Paso. Later Pacific Northwest renewed its effort to sell gas in the southern California market until this effort was terminated by its acquisition by El Paso. In these circumstances, the Court held the acquisition violated § 7. The opinion said that the relations of Pacific Northwest with Edison "illustrates what effect Pacific Northwest had merely as a potential competitor. . . . We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State." 376 U.S. 659. This is the only mention of "potential" in the opinion. The Court's holding in this respect is epitomized by this sentence: "Unsuccessful bidders are no less competitors than the successful one." 376 U.S. 661. Whether one calls an unsuccessful bidder an "actual" or a "potential" competitor seems to be a matter of choice of words. In the circumstances

of the El Paso case it is clear that the "potential competitor" was an actual effective operating force in the market.

The second case referring to this concept was *U.S.* v. *Continental Can Co.*, 378 U.S. 441. The issue presented was whether the acquisition of the nation's third largest producer of glass containers by the nation's second largest producer of metal containers violated § 7. The District Court held that there was no violation since metal containers and glass containers were separate lines of commerce. This Court reversed, saying that § 7 protects any area of "effective competition" and that there is a large area of "effective competition" between metal cans and glass containers. Citing the El Paso case, the Court said that "the competition with which § 7 deals includes not only existing competition but that which is sufficiently *probable and imminent.*" [emphasis added.] 378 U.S. 458. After discussing the large area of effective competition between the can company and the glass company, the Court added that the can company might have concluded that it could insulate itself from competition by acquiring a major firm not presently directing its efforts toward the same end uses as the can company but having the potential to do so. This was the only reference to the concept of potentiality.

The first case in this Court in which the term "potential competition" was used appears to be *U.S.* v. *Penn-Olin Chemical Co.*, 378 U.S. 158. The Court noted, "This is the first case reaching this Court and on which we have written that directly involves the validity under § 7 of the joint participation of two corporations in the creation of a third as a new domestic producing organization." 378 U.S. 168-69. The

Court said that the same considerations apply to joint ventures as to mergers, and noted the statement in Brown Shoe that § 7 deals with "probabilities, not certainties." The District Court had held that it was necessary to prove as a matter of probability that *both* companies would have entered the market as individual competitors, if the joint venture had not been formed, in order to show that potential competition between the two companies had been foreclosed. This decision was reversed, and the case was remanded, as this Court held that, "There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter." 378 U.S. 173. The Court noted that the industry was rapidly expanding and recited numerous other evidentiary facts showing that "each company had compelling reasons for entering the . . . market." 378 U.S. 175. Nevertheless, this Court remanded the case to the District Court for a determination whether, in the light of all the facts, the elimination of potential competition involved the probability of a substantial lessening of competition.

The potential competition concept was next discussed in *F.T.C.* v. *Proctor & Gamble Co.,* 386 U.S. 568. In this case, Clorox was the leading manufacturer of household liquid bleach, being the only national seller and having 48.8 percent of national sales. Proctor was the largest seller of soaps and detergents and other household products sold and used in connection with household bleach. Proctor was also the largest national advertiser. This Court sustained the F.T.C. finding that the acquisition of Clorox by Proctor violated § 7. The opinion said that Proctor had entered a market

which adjoins those in which it is already well established and which is virtually indistinguishable from them. The anticompetitive effects of this are (1) the substitution of a powerful acquiring firm for an already dominant firm, and (2) the elimination of the potential competition of the acquiring firm. The Court said that the evidence "clearly shows that Proctor was the most likely entrant." 386 U.S. 580. In addition, "It is clear that the existence of Proctor at the edge of the industry exerted considerable influence on the market." 386 U.S. 581.

The next case in which potential competition was mentioned was *Ford Motor Co.* v. *U.S.*, 405 U.S. 562. In that case, the District Court held § 7 violated by Ford's acquisition of a major independent spark plug manufacturer. There were two markets for spark plugs, the original equipment market and the aftermarket, or replacement market. General Motors made its own spark plugs, so Ford was the largest customer of OE spark plugs. The District Court held that prior to the acquisition Ford was both the major customer in the OE market and had a "pervasive impact on the aftermarket." The District Court said that, "Ford may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication. Had Ford taken the internal-expansion route, there would have been no illegality; not, however, because the result necessarily would have been commendable, but simply because that course has not been proscribed." 286 F.Supp. 441, quoted at 405 U.S. 567-568. This Court affirmed, quoting a passage from the Brown Shoe opinion relating to the vice of a vertical arrangement tying a customer to a supplier. The main controversy was over the relief to be ordered. The District

Court not only ordered divestiture but enjoined Ford from manufacturing spark plugs for 10 years. The Court's opinion sustained this decree on the ground that it would restore Ford's position as the largest purchaser of spark plugs from independent manufacturers and would not significantly lessen "Ford's moderating influence as a potential entrant on the edge of the market." A partially dissenting opinion argues that the injunction wipes out for the duration of the restriction any pro-competitive influence Ford might have as a potential entrant. In any event, the discussion of potential competition is confined to references relating to this aspect of the remedy.

The one case in which this Court has given an extended discussion of potential competition is the recent one of *U.S.* v. *Falstaff Brewing Corp.*, 410 U.S. 526. The Court there held that Falstaff's acquisition of Narragansett Brewing Co. might violate § 7. Of the nation's ten largest brewers, only Falstaff, which was fourth, and the eighth and ninth largest, did not sell in New England. Of these three, Falstaff had the closest brewery. Narragansett was the largest seller of beer in New England. The District Court held that the acquisition did not violate § 7 because the evidence showed that the management of Falstaff had decided not to enter the New England market except by merger. This Court reversed. It held that § 7 bars acquisitions of a market competitor by a noncompetitor where the new entrant threatens to dominate the market or otherwise upset market conditions to the detriment of competition, and also where "the entry eliminates a potential competitor exercising present influence on the market." This Court held the District Court erred in failing "to give separate consideration

to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market." The case was remanded to the District Court for a determination "whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition." The Court expressly left open the question whether § 7 bars a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, but that is challenged on the grounds that the entering firm could have, but did not, enter de novo or through toehold acquisition, and that, in this latter sense, potential competition was lessened. There were two separate concurring opinions and a dissenting opinion, but none challenged the analysis of potential competition set forth in the prevailing opinion.

In summary, this Court has held that potential competition must be considered under § 7 in the following circumstances:

El Paso case—the acquired company was the only likely entrant into the market, clearly influenced prices in the market and was an unsuccessful bidder in the market.

Continental Can case—the acquired company was in actual competition with the acquiring company and had the potential to enlarge the area of competition.

Penn-Olin case—in a joint venture it is necessary to consider whether the company not entering the market but having a compelling reason to do so might have remained at the edge of the market continually threatening to enter.

Proctor & Gamble case—the acquiring company entering the market was the most likely entrant, clearly exerted a considerable influence on the market, and was the overwhelmingly dominant firm in the market after entry.

Ford case—the acquiring firm was the major customer in the market, exerted a pervasive influence on the market, and was apparently the only likely entrant.

Falstaff case—where a noncompetitor enters a market by merger, § 7 applies if the entrant threatens to dominate the market or otherwise upset competitive conditions, or if the entrant was previously exercising present influence on competition in the market by virtue of its position on the edge of the market.

Thus it is clear under the holdings and opinions of this Court that the concept of potential competition does not change or enlarge the scope of § 7. As this Court said of § 7 in *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294: "Mergers with a *probable* anticompetitive effect were to be proscribed by this Act." [emphasis added.] 370 U.S. 323. The use in § 7 of the words "may be" do not "apply to the mere possibility but only to the reasonable probability" of the proscribed effect. 370 U.S. 323, n. 39. The point is best summed up by the language of this Court in Continental Can, where it is said that § 7 deals not only with existing competition but also with that which is "sufficiently probable and imminent." 378 U.S. 458.

B. Plaintiff's Theory Misconceives the Concept and the Nature of Both Potential Competition and of Competition.

If the District Court in either of the companion cases now before this Court had adopted the theories

and arguments set forth in plaintiff's briefs, the decisions would have to be set aside by this Court on the grounds that the results were reached by the application of erroneous principles. The evidentiary facts are discussed elsewhere in this brief. Here it is asserted that regardless of the evidentiary facts the concepts and theories urged by the plaintiff are wrong and must be rejected by this Court.

Section 7 of the Clayton Act, like all broad statutes, is necessarily couched in general language requiring exegesis and specification by the courts. It forbids certain corporate acquisitions the effect of which "may be substantially to lessen competition". In the Brown Shoe case this Court gave extensive consideration to the meaning of this phrase and held that "may be" did not require certainty and did not include a mere possibility but meant a reasonable probability. After this meaning was established, the concept of "potential competition" developed in the line of cases discussed above, as one of the kinds of competition that might be within the scope of § 7.

The Oxford English Dictionary, Funk & Wagnalls, and Websters agree that "potential" means "possible as opposed to actual". Taken literally, this would mean that the theory of "potential" (in the sense of possible as opposed to actual) competition had rendered nugatory the Court's interpretation of § 7 in Brown Shoe. However, the opinions of this Court are unmistakably clear that the concept of potential competition was developed within the meaning given to § 7 in Brown Shoe. Thus, as set forth in the preceding discussion, this Court used the concept of potential competition to mean competition which was not actual but which was "probable and imminent".

However, one will search plaintiff's briefs in vain for any recognition or indication that this is the meaning of potential competition. Throughout its briefs in both companion cases, plaintiff argues on the basis of supposition and hypothesis, asserting what "could" or "may" or "might" happen. Both briefs are bottomed on arguments that if the mergers are frustrated some alternative modes of competition are possible, not that any are probable and imminent.

For example, plaintiff argues that the Seattle bank (NBC) could sponsor a new bank in Spokane and "pending its eventual acquisition, NBC could assist it in branching in the city. . ." (Pl. Wash. Br. 50.) The District Court found that this was impossible because, inter alia, the evidence showed the Comptroller would not grant a charter for a new bank in Spokane. Plaintiff responds that this finding relies heavily on testimony by the Regional Administrator of National Banks, and therefore "does not establish that NBC could not have obtained a charter for a new sponsored national bank". (Pl. Wash. Br. 51.) Plaintiff goes on to argue that, "Only if the new entry might threaten the stability of existing banks could the Comptroller properly refuse to permit new competition." (Pl. Wash. Br. 52.) This latter argument is directly contrary to the holding of this Court in *Camp* v. *Pitts*, 411 U.S. 138, that refusal of a charter is justified on a finding that a new bank would be an uneconomic venture in light of the banking needs and services already available in the community. However, even more significant is the thrust of plaintiff's argument that if there is the slightest possibility of some hypothetical mode of entry this constitutes potential competition.

Plaintiff's argument in the Connecticut case is similar. Plaintiff argues that, although Connecticut law prohibits entry by each bank into the home office city of the other, "Entry was financially possible because the banks are large, strong and profitable." (Pl. Conn. Br. 18.) In Connecticut, also, the District Court found that the Comptroller would not issue new banking charters, since this was announced in a written policy issued in 1965 and not revoked. (Pl. Conn. Br. 53; App. 2573-75-74.) Plaintiff dismisses this finding with the comment that the published policy is "simply . . . the present view, subject to change, of an administrator who presumably will do his statutory duty of taking into account antitrust doctrine. . ." (Pl. Conn. Br. 53.) The relatioship between antitrust doctrine and banking law is discussed below and is immaterial here. The point is obvious that plaintiff is urging that the mere possibility of some future change in policy, no hint of which is given in the record or the argument, suffices to show the existence of potential competition. Again it is clear that plaintiff is arguing that potential competition within the meaning of §7 exists if there is the mere possibility of some competitive developments. Plaintiff neither recognizes nor attempts to meet the clearly enunciated standard of this Court that the potential competition which comes within the scope of § 7 must be probable and imminent.

It appears that plaintiff does not have any coherent concept of either potential competition or competition and that its statements regarding these somewhat abstract concepts are made on an ad hoc basis to oppose any arguments urged by defendants or support any arguments plaintiff desires to urge. For example, while arguing that the remote and unlikely possibilities men-

tioned above show the existence of potential competition, plaintiff also argues that competition for checking accounts by savings banks in Connecticut is merely speculative despite the fact that a state law which will take effect no later than December 31, 1975, specifically authorizes savings bank checking accounts. (Pl. Conn. Br. 25.) Similarly, in its Washington brief plaintiff argues at one point that the entry of a potential competitor into the market does not change market structure, while at another point it argues that such entry does change market structure. (Pl. Wash. Br. 30, 56.)

Plaintiff is also confused and inaccurate in dealing with the effect of increased competition in the market. In the Washington brief it argues that a merger which enables a bank to compete more effectively and to provide additional services is not a factor to be considered in assessing the competitive impact but is to be considered only under the "convenience and needs" defense. (Pl. Wash. Br. 55, n. 51.)

In Connecticut plaintiff attacks a court finding that the merger "would mean more competitive choices for the people of Connecticut and a more healthy and balanced banking structure of five or six strong and relatively equal competitors". (Pl. Conn. Br. 60.) This was based on the fact that there are in Connecticut two competitive statewide banks and, at most, eight banks with the capability to become statewide banks. (Pl. Conn. Br. 61.) The Connecticut merger would result in three competitive statewide banks and reduce the number of potential statewide competitors to six. Plaintiff opposes the consolidation of small competitors into larger, more powerful competitors arguing that, "This approval of 'countervailing power' is the

cornerstone of the district court's analysis of competitive effects, and it is contrary to the decisions of this Court and to the purpose of Section 7 . . ." (Pl. Conn. Br. 60-62.) Since plaintiff regards this part of the analysis as a "cornerstone" it requires some explanation to straighten matters out.

Countervailing power has nothing to do with the relative size or power of competitors. Competition and "countervailing power" are not similar, but, in effect, polar economic concepts. Competition means rivalry among firms on the same side of the market. Countervailing power means bargaining by firms on the opposite side of the market.

Perhaps the best exposition of the concept of competition from the legal viewpoint is in the Report of the Attorney General's Committee to Study the Antitrust Laws. It explains that the word "competition" is used in two senses. In the first sense it "denotes only the presence of more than one seller in a market, and identifies a condition of rivalry among them. . ." (p. 318.) In the second generic sense, the idea of competition "is contrasted with 'monopoly' with respect to the degree of market power possessed by a seller, or a group of sellers acting in concert. This second meaning of competition can be summed up as identifying a market condition in which the rivalry of sellers, of itself, prevents the existence of the discretionary market power of monopoly over price and output." (p. 319.)

The concept of "countervailing power" was introduced by Professor Galbraith in 1952 in his book, "American Capitalism". He noted that, "It was to the same side of the market and thus to competition

that economists came to look for the self-regulatory mechanism of the economy." (p. 117.) Where competition disappeared and was replaced by a small group of powerful firms, it was easy to suppose that all effective restraint on private power had disappeared. But, Galbraith says, "In fact, new restraints on private power did appear to replace competition. They were nurtured by the same process of concentration which impaired or destroyed competition. But they appeared not on the same side of the market but on the opposite side, not with competitors but with customers or suppliers. It will be convenient to have a name for this counterpart of competition and I shall call it *countervailing power.*" (p. 118.)

Plaintiff is correct in assuming that the theory of countervailing power has not replaced the theory of competition as a foundation for the antitrust laws, and that the purpose of § 7 is to prevent substantial lessening of competition. However plaintiff is quite mistaken in calling increased rivalry among vigorous competitors "countervailing power". An increase in the number of "competitive choices" and a more vigorous rivalry between stronger competitors is an increase in competition, not "countervailing power" or any other malign or illegal force. This Court explicitly recognized that in *Brown Shoe* where it said (370 U.S. 319):

> Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market. . . .

Plaintiff's confusion on this point leads to inconsistencies in its arguments. In Washington plaintiff argues that more effective competition and the provision of additional banking services are not factors to be considered in assessing competitive impact (Pl. Wash. Br. 55, n. 51), and that numbers of banking offices and convenience of access by customers to banking offices are not indicia of competition. (Pl. Wash. Br. 61-62.) However, in Connecticut plaintiff argues that differences in evening hours of service in branches of a banking system are "evidence of service competition". (Pl. Conn. Br. 30, n. 38.) Certainly if some variation in banking hours is "evidence of service competition", the same must be said of the far more substantial and significant efforts involved in providing more convenient branch offices, and offering such additional banking services as international service, mining, agricultural, and student loans, and the other important service offerings which were shown in the evidence and relied upon by the district courts. Furthermore this Court has said that the test of a competitive market is "whether consumers are well served." *U.S.* v. *Philadelphia National Bk.*, 374 U.S. 321, 367, n. 43.

Another error concerning the nature of competition appears in plaintiff's argument in the Connecticut case. Plaintiff's brief begins by conceding that there is no issue on this appeal concerning the elimination of actual competition between the merging banks. (Pl. Conn. Br. 4, n. 1.) However, plaintiff then argues against the District Court finding that the State is a relevant market by saying that if this is so, "then the defendants cannot be potential competitors because all banks in Connecticut are necessarily actual competi-

tors in one statewide market". (Pl. Conn. Br. 63, also 16, 19, 65-66.) This logic is reminiscent of the movie title "If this is Tuesday it must be Belgium". The area of competitive impact determines the market for purposes of antitrust analysis of a merger. But the definition of a market most assuredly does not change the area of competition. Furthermore, the fact that the merging banks do not have any area of competitive overlap does not tend in any way to negate the conclusion that they may both be in the same relevant market. It is simply not true that all firms in every market are necessarily in competition with one another.

Simple, commonsense, empirical observation will establish the point. In the *Von's Grocery Co.* case, 384 U.S. 270, the relevant market was the retail grocery market in the Los Angeles area. There were more than 3,500 single grocery stores and about 150 grocery store chains in that market. 384 U.S. 273. Some of the chains competed with each other in all or parts of the market. But quite obviously individual grocery stores in widely separated parts of the immense Los Angeles area were not in competition with each other—although they were within the relevant market. It may be easier to visualize the Washington, D.C. market which is familiar to most of those involved in these cases. Here there are a few large grocery chains operating throughout the metropolitan area and obviously competing with each other through advertising and by other means. There are also numerous small grocery stores scattered throughout the metropolitan area and each drawing patronage from its neighborhood. For purposes of antitrust analysis, no doubt the Washington metropolitan area, like Los Angeles, is a relevant market

as to retail grocery operation. This does not mean that a grocery store in Bethesda is in competition with one in Alexandria, or Falls Church or Silver Spring.

Plaintiff's argument that if the State is a relevant geographic market for purposes of antitrust analysis, then it necessarily follows that banks not in actual competition with each other must be considered as actual competitors is just not logical, sensible or tenable under any rational legal or economic theory.

One final illustration of the confusion inherent in plaintiff's concept of competition is plaintiff's apparent assumption that competition is not simply economic rivalry but must be business enmity exhibited in personal hostility. Thus plaintiff argues that references to "personal", "cordial" and "friendly" relationships among bankers in the Spokane market are evidence of lack of vigorous competition. (Pl. Wash. Br. 57.) The suggestion that an opponent, or competitor, must necessarily be an enemy comes strangely from lawyers who are professionally enjoined to oppose each other with civility and to confine their adversary relationships to the courtroom. It should be unnecessary to urge at this point in our history that civility in all our social relations is sorely needed. Any intimation from this Court that civility in economic relations could be characterized by a zealous prosecutor as indicating "personal", "cordial" or "friendly" relations and used as evidence of anticompetitive conduct under the antitrust laws could only add to social turmoil. In fact, as we know from every other field of endeavor, ranging from athletic competition to litigation, there is no relation between the degree of civility or cordiality among the participants and the degree of their rivalry or competition. On grounds of both logic and

social policy this argument of plaintiff should be not merely ignored but repudiated by this Court.

C. Plaintiff's Theory of Potential Competition Is Illogical, Unworkable, and Leads to Absurd Results

The preceding discussion has demonstrated that plaintiff's theory of potential competition is based on a concept of potentiality defined as that which is possible rather than that which is probable and imminent. Plaintiff's theory is, therefore, contrary to the prior decisions of this Court on the subject. Plaintiff gives implicit acknowledgement of this in arguing that its theory requires the Court to adopt the rule which the Court expressly refused to adopt and left open in Falstaff (Pl. Wash. Br. 28), that § 7 bars a merger by a company whose entry into the market would have no effect whatsoever on competition merely because that company might have (possibly) entered de novo or by toehold acquisition.

The basic misconception underlying plaintiff's theory of potential competition is that it views competition as a static structure rather than as a dynamic process. Of course, plaintiff does not state the matter this explicitly, but the misconceived reliance on structure rather than process or performance permeates its argument in both cases. Thus plaintiff bluntly says, "The purpose of Section 7 is to prevent changes in the structure of industries which threaten anticompetitive consequences." (Pl. Wash. Br. 22, 28.) The relationship between structure and performance, if any, is tenuous or irrelevant in plaintiff's theory. Thus plaintiff's expert economic witness in Washington testified that banking is structurally concentrated in every city and banking market in the United States but that it

is possible such markets may also be highly competitive from the standpoint of performance. (Wash. App. 534.)

Plaintiff's theory was not argued quite so bluntly in the Connecticut case, but the facts are no less striking. The District Court specifically found that "since December 31, 1955, through 1971, in the 169 towns in Connecticut, the number of banking alternatives (including savings banks) has increased in 107 towns, decreased in two towns and remained the same in 60 towns and, even according to the plaintiff's witness, this is procompetitive." (Finding 148; 362 F.Supp. 260.) Plaintiff's brief does not deign to mention this finding and, instead, repetitiously alleges that the "structure of banking in Connecticut" is growing more concentrated. (Pl. Conn. Br. 4, 7, 63-65.) The message of plaintiff's briefs is clear: Plaintiff's theory is based on static structure that can be measured by something called "concentration ratios" and not on competition. Plaintiff's theory does not take account of what actually happens in the market place, whether customers in fact have more alternative sources, or whether there is in fact a more competitive performance.

In fact, plaintiff's briefs come close to making this argument explicitly. In Washington plaintiff argues that "a merger that eliminates a substantial potential entrant from a concentrated market cannot be justified on the ground that the market in which the acquired firm operates is nevertheless currently competitive." (Pl. Wash. Br. 56.) In Connecticut plaintiff derides the court's conclusions that neither bank was permitted any significant de novo branch penetration into the service market of the other, and that neither

bank was able to accomplish any meaningful growth on the state-wide level. (Conclusions A(2) 3, 4; 362 F.Supp. 287.) Plaintiff argues that these conclusions merely show the "district court's misunderstanding of potential competition," that "The significance of potential entry is not lost merely because the potential entrant might initially make only a small entry into a market," and, indeed, that it does not matter for §7 purposes whether the entrant ever enlarges its market share. (Pl. Conn. Br. 57.) In other words, plaintiff argues that under §7 the preservation of potential competition is more important than the existence or expansion of actual competition.

This leads plaintiff to make what is virtually the reductio ad absurdum of its own argument. In Connecticut the District Court found that to the extent there had been any increase in concentration of deposits among banks or commercial banks since 1959, "virtually all of the increase is accounted for by two savings banks and the two Hartford banks." (Finding 154; 362 F.Supp. 261.) The two Hartford banks are, of course, the two large state-wide banks which are competitors of both the merging banks. Thus plaintiff is in the position of arguing that the growing size and strength of the competitors of the merging banks is a reason for preventing these two smaller non-competitive banks from merging into a more effective competitor of the larger banks which are responsible for the increase in concentration which plaintiff decries. This conclusion of plaintiff's is not only condemned by common sense but is also contrary to sophisticated antitrust analysis. See *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294, 319. The Report of the Attorney General's Committee to Study the Antitrust Laws analyzing the

factors necessary to the existence of effective competition gives first place and greatest importance to the number and relative strength of firms. The Report says: "Effective competition may be affected not only by the total number of sellers; their relative size and strength must also be considered." (p. 326.)

It is plaintiff's theory of potential competition, not the merger movement, which is most likely to result in an increasing concentration of economic power, at least in banking. As the economy grows, banks tend to grow to meet expanding business needs. As §7 has effectively proscribed the merger of competitors, non-competitive banks have combined into stronger and more competitive banking systems and new banks have been formed to keep the number of total banks constant, or slightly increasing. From 1962 to 1972 there were 1,345 mergers of commercial banks, there were 1,937 new commercial banks formed, and the total number of commercial banks in operation in the nation increased from 13,426 to 13,936. Statistical Abstract of the U.S., 1973, p. 446. (The slight discrepancy in numbers is accounted for by liquidations and suspensions.) However, the smaller the community, the smaller the size and the fewer the number of banks it can support. The smaller the bank the more limited it necessarily is in personnel, resources, facilities and the ability to provide a full range of banking service. This is illustrated in the Washington case, where the Seattle bank is described as a "full service bank" while the Spokane bank is found to be a "limited service bank". (Wash. App. 1935, Findings 15, 16.) However, plaintiff argues that because local banking markets can support only a limited number of banks they "inherently tend to be concentrated", and it is therefore

particularly important to preserve "potential competition" by preventing mergers with larger banks outside the local markets as in the Washington case. (Pl. Wash. Br. 32.) It is apparent that regardless of the mooted virtues of de novo or foothold entry, these have nothing to do with strengthening the position of the small banks in local markets. Therefore, plaintiff's argument in effect asserts that the greater the need of local banks for acquiring the assistance of stronger outside banks to serve their communities and to compete more effectively, the stronger are the legal inhibitions against their being permitted to do so. Thus it is precisely where competition is weakest that plaintiff's theory will operate to prevent it from being strengthened.

This was obviously not the purpose of §7, but this is the effect of plaintiff's construing §7 as though it were intended to preserve some static structure from change rather than being intended to protect the process of competition as it operates in the real world.

Carrying the logic of plaintiff's position only one step further illuminates even more the fallacy of plaintiff's theory. In any market, any new actual competitive entrant will necessarily have been a potential entrant before entering the market. Unless the number of potential entrants is infinite, which is impossible, the entry of any new competitor will, accordingly, reduce the number of potential entrants. But plaintiff argues that §7 forbids lessening potential competition by reducing the number of potential entrants. Taken literally, this would mean that §7 forbids any new competitive entry, particularly into concentrated markets. This is obviously absurd. Plaintiff seeks to escape this dilemma by saying that entry is

not barred if it is by foothold acquisition or de novo. However, this does not solve the logical dilemma of plaintiff's theory. It potential competition means, as plaintiff argues, that which is possible, then foothold acquisition reduces the possibilities quite as much as any other acquisition. It is certainly possible that a small competitor in a market may grow larger; and, indeed, this is more likely than it is that someone outside the market will enter and begin to compete. Therefore plaintiff's preference for entry into a market by foothold acquisition, rather than some other kind that does not change the market balance or structure, is simply a matter of preference, apparently based on plaintiff's general bias toward very small firms.

Furthermore, the situation is not essentially different with respect to de novo entry. As plaintiff concedes, "local banking markets can support only a limited number of banks." (Pl. Wash. Br. 32.) This is not the result of some over-protective attitude on the part of regulatory authorities but is the result of immutable economic laws as dozens (and in earlier years thousands) of bank failure have shown. This being so, whenever an identifiable potential competitor enters a market de novo it takes a place in that market that might possibly have been taken by some previously unidentified potential entrant. At the same time the entry reduces what plaintiff is pleased to call "potential competition." Therefore, even de novo entry lessens competition under plaintiff's theory, and consequently is forbidden by §7.

This is precisely the same dilemma that confronted this Court in first construing the Sherman Act. In 1911 it was urged upon the Court that §1 of the Sherman

Act "embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language." *Standard Oil Co.* v. *U. S.*, 221 U.S. 1, 63. The Court noted that this would lead to the conclusion that "every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, . . ." Ibid. The solution to this problem obviously was to hold that the courts must exercise reasonable judgment in every case in order to determine whether a particular act is embraced within the act. Thus arose the "rule of reason".

Clearly the same solution is called for here; and, indeed, the Court has already adopted it although plaintiff refuses to acknowledge this. The Court has said that §7 does not apply to the mere possibility of lessening of competition, potential or actual, but applies only to a situation involving a reasonable probability of a substantial lessening of competition. Further, the Court has said that §7 applies only to potential competition which is probable and imminent.

This is the only rational conclusion that can be reached if §7 is to be workable. Plaintiff concedes, and the Court's opinions state, that a potential competitor can enter even a concentrated market de novo or by foothold entry. This necessarily implies recognition of the fact that every action in a competitive market has both procompetitive and anticompetitive aspects. As the Court recognized in 1911, even a simple contract

for the sale of goods involves some form of "restraint." It requires a rule of reason to conclude that such restraint is not prohibited by §1 of the Sherman Act. Similarly every market entry, acquisition or merger has both procompetitive and anticompetitive aspects. This Court has held that, as a general rule the merger of actual competitors substantially lessens competition to a degree forbidden by §7 and is, therefore, prohibited. In the *Philadelphia Bank* case, 374 U.S. 321, the Court also held that anticompetitive effects in one market cannot be justified by procompetitive effects in another. 374 U.S. 370. Further, the Court held that the courts are not authorized under §7 to go beyond the field of competition to "some ultimate reckoning of social or economic debits and credits" in order to determine whether the merger would be socially beneficial. 374 U.S. 371. However, the Court neither held nor intimated that it was possible to escape the task of weighing the competitive impact of any challenged merger in the light of all the circumstances of the market in which that merger had competitive effects.

That is precisely what this Court has done in each case which has come before it involving potential competition. Each of these cases is discussed and briefly analyzed above. Here it is necessary to note only that in every potential competition case in which this Court has held that §7 had been or might have been violated, the potential competition eliminated was that of the only or of the leading and most probable entrant into the market, and in each case the market has been a large and growing one apparently able to support additional competitors.

If the theory urged by plaintiff in the cases now before the Court were adopted, rather than the reasonable interpretation heretofore applied, §7 would become unworkable and would frustrate the very purposes for which it was enacted. It would prevent mergers and affiliations among the weakest and smallest firms in the smallest markets. It would be applied most rigorously against those facing the competition of larger firms which were growing so that plaintiff's calculation of market concentration was increasing, even though the increase was due to the effect of growth by the larger competitors and not by the smaller merging firms. In short, if §7 were applied as plaintiff urges it should be applied in these cases, its effect would be to protect the largest firms with the largest market shares from competition by mergers to strengthen smaller firms, particularly in small markets. The net effect would be to deprive the public of the benefits of having potential competition ripen into actual competition. Clearly this is not the result intended by Congress nor the conclusion that htis Court should adopt.

D. Plaintiff's Theory Is Unsound and Dangerous to Civil Liberties as Well as to the Competitive System.

Plaintiff's theory not only leads to results that would endanger the competitive system, but also threatens our freedom and liberties on a much broader front. It is hornbook jurisprudence that the law is a seamless web, and ideas or definitions developed in one field are more often than not used in other areas of the law whenever a similarity or analogy can be discerned.

The basic fallacy in plaintiff's theory of potential competition is that it does not distinguish between

mere possibility and reasonable probability. Science tells us that anything and everything is possible. A pan of water on a hot stove may freeze. All the air in the room may suddenly collect near the ceiling, leaving the occupants to suffocate.[36] Such things are not impossible, only extremely improbable. But such possibilities are so remote they must be disregarded for all practical purposes. The law must proceed on the basis of reasonable probability.

The alternative, of permitting legal action on the basis of mere possibility, is to accuse on suspicion and to convict on surmise. Such a theory dispenses with any test of probable and imminent, or, in civil rights cases, of clear and present danger. When possibility becomes the legal standard, accusation is tantamount to conviction because no one can prove that any accusation is impossible. Therefore, the basic logic of plaintiff's potentiality theory has, in fact, been used as the legal justification for the suppression of civil rights and the destruction of individual freedom and liberty by every authoritarian government in recent history. The accusation always is that the accused is a potential danger to the state. Repression is always imposed with the ostensible justification that it is necessary to prevent the possibility of subversion, or some other similar evil.

No doubt the well intentioned and honorable representatives of plaintiff will respond that whatever may

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[36] *See* A. EDDINGTON, THE NATURE OF THE PHYSICAL WORLD 75-76 (1928); G. GAMOW, ONE TWO THREE . . . INFINITY 213-15 (1947); K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 203 (1959); H. REICHENBACH, ATOM AND COSMOS 172, 275-76 (1933); H. REICHENBACH, EXPERIENCE AND PREDICTION 38-39 (1938); HEISENBERG, *Planck's Discovery and the Philosophical Problems of Atomic Physics*, in ON MODERN PHYSICS 16 (1962).

have been done elsewhere under authoritarian and tyrannical governments can't happen here. The answer is simple: It already has. In 1942 over 100,000 American residents were seized and shipped to concentration camps [37] by the United States government, acting under administrative fiat, for no other offense than that of being of Japanese ancestry. See Maisie & Richard Conrat, Executive Order 9066 (Cal. Hist. Soc., 1972). The basis for this action was a report by the Commanding General of the west coast area characterizing all persons of Japanese descent as "potential enemies" [38] and referring to Japanese schools and organizations as evidence of "possible group disloyalty".[39] This Court, during the heat of a shooting war, upheld the action. *Korematsu* v. *U.S.*, 323 U.S. 214.[40] Justice Jackson, dissenting, noted, "All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' " [41]

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[37] Justice Roberts, dissenting, said the so-called relocation centers were merely an "euphemism for concentration camps." *Korematsu* v. *United States*, 323 U.S. 214, 225, at 230.

[38] *Korematsu* v. *United States*, 323 U.S. 214, 233, at 236 (Justice Murphy, dissenting).

[39] *Korematsu* v. *United States*, 323 U.S. 214, 233, at 237 (Justice Murphy, dissenting).

[40] But cf. *Ex parte Endo*, 323 U.S. 283. Also note that in *Hirabayashi* v. *United States*, 320 U.S. 81, upholding a curfew order by the military commander of the West Coast military area, Justice Douglas, concurring, said that the decision assumes that national survival is at stake. The three decisions in this and the preceding note were rendered duing 1943 and 1944, while the nation was at war with Japan and Germany.

[41] *Korematsu* v. *United States*, 323 U.S. 214, 242, at 246 (Justice Jackson, dissenting).

Whether and when the principle of plaintiff's theory of potentiality may "expand itself to the limit of its logic" no one can say. But it is futile and dangerous for this Court to create such a threat to our civil liberties. Even in this country the Court has, in recent decades, been called upon to set aside convictions because they were entered without proof in situations where local authorities thought they perceived the possibility of a breach of the peace.[42] Surely recent examples of unjust accusations and prosecutions are sufficiently well known to make us all aware of the necessity of maintaining reasonable standards of proof as a basic premise of our legal system. This is what is involved in plaintiff's theory of potentiality. Whether we are dealing with "potential competitors" or "potential enemies" the law must require proof of probability and imminence of the danger to be avoided or we shall lose far more than economic competition.

IV. SECTION OF THE COUNTRY MEANS THE SAME THING AS RELEVANT GEOGRAPHIC MARKET.

Heretofore it has been elementary antitrust law that the phrase "section of the country" in §7 refers to relevant geographic market. The leading text on the subject says:

> The statutory phrase 'in any line of commerce in any section of the country' refers to a relevant market which has both *product* and *geographic* boundaries. Determination of this market is the threshold issue and a 'necessary predicate' to a finding of a violation of Section 7 of the Clayton Act.
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[42] *Barr* v. *Columbia*, 378 U.S. 146 (1964); *Taylor* v. *Louisiana*, 370 U.S. 154 (1962); *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

> The relevant market generally is defined as the 'area of effective competition' within which one or both of the participating firms conduct their business. The 'area of effective competition' is determined by reference to both a product market—the 'line of commerce'—and a geographic market—the 'section of the country.' [43]

This statement is soundly based upon the clearest expressions of this Court in earlier cases. In *Brown Shoe Co.* v. *U. S.*, 370 U. S. 294, the Court said that determination of the relevant market is a necessary predicate to finding a violation of §7 because there must be a finding that the threatened action will substantially lessen competition within an area of effective competition and substantiality can be determined only in terms of the market affected. 370 U.S. 324. The Court said: "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')." (Id.) The Court further discussed the criteria to be used in determining what it called "the geographic market" and said that these must correspond to commercial realities and be economically significant. 370 U.S. 336-337. The terms "geographic market" and "section of the country" are used synonymously and without differentiation throughout the opinion.

Similarly, in *U. S.* v. *Philadelphia National Bank*, 374 U.S. 321, this Court reversed the District Court on the issue of determination of the appropriate "section of the country". The Court said: "The proper question to be asked in this case is not where the parties

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[43] 3 von Kalinowski, Antitrust Laws and Trade Regulation, §18.01 [footnotes omitted].

to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." 374 U.S. 357. The Court then discussed applicable criteria and concluded that "the four-county area in which appellees' offices are located would seem to be the relevant geographical market." 374 U.S. 359.

Despite these, and numerous other clear and authoritative statements of identity between "section of the country" and "relevant geographic market" plaintiff in the cases now before the Court argues that the two terms are not synonymous and that it can search for and allegedly find some possible competitive effect in an area or section of the country which is not a relevant market. Thus, in Washington plaintiff argues, "Both Eastern Washington and the State as a whole, although not traditional banking markets nevertheless are relevant sections of the country within which to consider the competitive impact of the merger." (Pl. Wash. Br. 65.) Similarly, in Connecticut plaintiff argues that, "The whole state is a section of the country, although it is not a banking market . . ." (Pl. Conn. Br. 17, also at 28, 31).

Plaintiff's argument on this point, insofar as it has any support, is apparently based on *U. S.* v. *Pabst Brewing Co.,* 384 U.S. 546. However, close examination of that case will show that it does not support plaintiff's position. In Pabst, plaintiff attacked the merger of two directly competing brewers under §7 alleging a lessening of competition in the country as a whole and in various sections thereof. At the close of plaintiff's case the District Court dismissed, holding that there was no showing of a lessening of competi-

tion in the country as a whole and a failure to show that any smaller area was a relevant geographic market. The holding of the Court is set forth in the following statement from the opinion:

> The merger of Pabst and Blatz brought together two very large brewers competing against each other in 40 States. In 1957 these two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area of Wisconsin, Illinois, and Michigan, and 4.49% of the sales throughout the country. In accord with our prior cases, we hold that the evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area, and in the entire country was sufficient to show a violation of §7 in each and all of these three areas. [384 U.S. 551-552].

There were several concurring opinions but no dissent. Justice White concurred on the ground that there was a lessening of competition in the beer industry in the nation as a whole. Justice Harlan and Justice Stewart concurred on the grounds that there was a prima facie showing that the State of Wisconsin and the three-state areas were both relevant geographic markets. Justice Fortas concurred in the result but did not join the opinion because of the view that the specific geographical market had not been sufficiently defined in the Court's opinion. There is nothing in the Court's opinion, or in any of the concurring opinions to show that a merger can be held to violate §7 without the necessary preliminary finding of a relevant geographic market.

The error of plaintiff in misconceiving the requirements of §7 is apparently based upon its erroneous view that "potential competition" refers to any vague

possibility and does not require a showing of reasonable probability. Thus, in the Washington case plaintiff argues that although Eastern Washington and the State as a whole are not banking markets nevertheless one or the other of the merging banks might somehow expand into one of these areas and that in some unspecified manner this might result in the banks coming to "pursue parallel practices of mutual advantage without regard to local competitive conditions." (Pl. Wash. Br. 66.) The answer to this hypothetical possibility is that it simply has not been established by evidence in the record. Beyond this, it must be observed that if there is any deliberate agreement among the bankers to avoid competition then they face prosecution by plaintiff under §1 of the Sherman Act. If the banks do not combine, conspire or agree to avoid competition in any respect but merely respond to market conditions in a manner which plaintiff chooses to derogate as something less than "vigorous competition" then it is clear that the banks have done nothing improper or illegal under any existing statutes. There is nothing in §7, or any other antitrust law, that authorizes plaintiff to act as a general overseer of economic conduct and to insist upon policies not required by statute, regulation or judicial authority but somehow meeting a subjective criterion of plaintiff's approval.

Similarly, in Connecticut plaintiff's argument leads to illogical and inconsistent contentions. Thus plaintiff asserts that "a geographic area need not be a banking market to be a section of the country." (Pl. Conn. Br. 31.) It attacks the District Court's findings on the grounds that "market definition depends not on rigid legal rules but on ascertainment of the competitive realities of trade." (Pl. Conn. Br. 41.) Plaintiff then

argues that if the District Court concludes that the State is the relevant section of the country "then the defendants cannot be potential competitors because all banks in Connecticut are necessarily actual competitors in one statewide market." (Pl. Conn. Br. 63.) Thus plaintiff is asserting, first, that a relevant geographic market is not the same as a section of the country, second, that a relevant geographic market must be ascertained by competitive realities, and, third, that within any section of the country all the firms in a particular line of commerce are necessarily actual competitors.

These propositions are not only mutually inconsistent but absurd on their face. As pointed out in the preceding discussion, within any geographic market there can be, and often are, firms which are not in competition with each other. Examples of retail grocery markets in metropolitan areas were given above. Another example is the recent Falstaff case, where the Court found that Falstaff was a competitor in the national beer market but not in the regional New England market, and that Narragansett was a competitor in the regional New England market but not in the national market although it was geographically encompassed within it. As there may be firms within the same market that are not in competition, it must also be observed that there may be firms not in the market but nevertheless competing within it. As is well known, there are three large and one small automobile manufacturers located within the United States. Clearly the country as a whole constitutes a market for the sale of automobiles. Just as clearly there are numerous firms that compete within that market but that are not located within it. It is necessary to mention only a

few names, such as Volkswagen, Datsun, Toyota, Mercedes, and others.

In the Connecticut case plaintiff appears to contend that the Court should disregard the competition of New York City banks within the State of Connecticut because the market does not extend to New York City. However, the Court made detailed and specific findings as to the business done within the State of Connecticut by the New York City banks and was clearly correct in taking this competition into account even though it found that the relevant geographic market was properly limited to the State of Connecticut. Although plaintiff refers to the realities of competition, clearly it is thinking in terms of abstract and hypothetical theories rather than reality. Plaintiff's attempt to argue that there can be some possible competitive impact in an area denominated "section of the country" which is not a relevant geographic market is contrary to all of the teachings of this Court. It simply illustrates that plaintiff's theory of potential competition is based upon hypohetical supposition rather than upon any examination or evidence of reality or probability. As a matter of judicial precedent, economic principle, logic and common sense "section of the country" means the same thing as "relevant geographic market." The only reason that plaintiff attempts to differentiate between them is that plaintiff alleges something which cannot be shown to be either a competitive overlap or a competitive impact but which plaintiff contends is some kind of "potential" effect which brings these cases within the scope of §7, contrary to all principle and precedent.

V. THE ANTITRUST LAWS NEITHER REQUIRE NOR ENCOURAGE ATTEMPTS TO CIRCUMVENT STATE LAW.

A major difficulty presented by both the Washington and Connecticut bank merger cases is that plaintiff's statement of the questions presented is so broad and general that the genuine specific issues are obscured. In Washington, plaintiff's statement of the question amounts to no more than an issue whether the District Court was in error in not finding a violation of §7 (Pl. Wash. Br. 2). In Connecticut plaintiff asserts the questions presented to be whether the merging banks might have been significant potential entrants into each other's markets, and other local markets, and whether the merger might encourage a trend toward concentration in the state as a whole. (Pl. Wash. Br. 2.) In neither case is there a clear statement of the fact that plaintiff contends that merger is illegal if there is any alternative method of entering the market, even if the alternative may involve violation, evasion or circumvention of state law, which is the situation in both these cases.

This Court has held that a branch of a national bank "may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch, 12 USC § 36(c)." *First National Bank* v. *Dickinson,* 396 U.S. 122, 130. The purpose and intent of the federal statutes is to foster a climate of competitive equality between national and state banks. *First National Bank* v. *Walker Bank & Trust,* 385 US 252, 261; *Seattle Trust & Savings Bk.* v. *Bank of California,* (Civ. Nos. 72-2712 and 2750) —— F.2d —— (9th Cir., Jan. 30, 1974). It is equally plain that the laws of both Washington and Connecticut prohibit the establishment or operation by either of the merg-

ing banks of a branch in the city or town where the other is located except by acquisition or merger. In the State of Washington, the law in substance prohibits the establishment or operation of any branch outside the city or town in which a bank's principal place of business is located, except by acquisition or merger. RCW 30.40.020. In Connecticut, there is a "home office protection law" which prohibits any bank from entering any city or town where another commercial bank is headquartered except by acquisition or merger. Conn. Gen. Stat. 36-59.

Despite these clear legal prohibitions against independent, or de novo, entry into other banking areas or markets, plaintiff argues that potential competition has been substantially lessened in each case because the acquiring banks have, in effect, eliminated the possibility of entering the area of the other bank by circumventing the law. In Washington plaintiff argues that NBC, the Seattle bank, could have entered the Spokane market "by sponsoring a new bank and ultimately acquiring it . . ." (Pl. Wash. Br. 45, *et seq.*) In Connecticut plaintiff argues that Connecticut National "could make an independent entry into new markets" by "organization of a holding company whose agents would obtain a charter for a new state or national bank to be acquired thereafter by the holding company." (Pl. Conn. Br. 54, *et seq.*)

Plaintiff's argument in both cases is founded on the premise that the Comptroller could charter "new, *bona fide* national banks to be affiliated with existing banks. . . ." (Pl. Wash. Br. 47.) However, the evidence was that an application for a charter sought for the purpose of branching would not be accepted in the circumstances of these cases. Wash. App. 1011. See

12 C.F.R. § 4.2(a) (Application must be submitted to Regional Comptroller.) Cf. *Dearborn* v. *Manufacturers National Bank of Detroit,* 377 F.2d 496 (6th Cir. 1967) (Branching enjoined where intention to evade legal restriction disclosed); also see *First National Bank* v. *Walker Bank & Trust Co.,* 385 U.S. 252; *First National Bank* v. *Dickinson,* 396 U.S. 122. Therefore, the proposed method would work only if the intention to have a later acquisition were concealed at the time of application—which would certainly be improper and illegal.

The effect of the laws of Washington and Connecticut in preventing the establishment by means other than merger of new branches in the service areas involved is covered in the briefs of the banks, and we will not undertake to review or repeat the argument relating to the applicable respective state laws. However, one aspect of this seems beyond dispute. The right to proceed in the manner suggested by plaintiff would be challenged by state authorities. Regardless of how the legal issues might ultimately be determined, they are not directly presented in either of these cases, but the questions of law are unmistakably obvious. It is, therefore, a virtual certainty, that if such a method of entering either the Spokane or New Haven areas were attempted it would be met by a legal challenge. This fact alone is enough to make the method an imprudent and improbable one for a bank—on clearly objective grounds.

Indeed a prudent bank would probably be deterred from undertaking sponsorship and acquisition of another bank by the threat of suit from plaintiff itself. Plaintiff has brought suit under §7 attacking the very

method of sponsorship and acquisition which it espouses in these cases. *U. S.* v. *Trans Texas Bancorporation,* 1972 Trade Cases par. 74,257, p. 93,207, affirmed 412 U.S. 946. More recently, plaintiff has attacked the sponsorship by one bank of another as a violation of §1 of the Sherman Act, as well as of §7. In deciding against plaintiff the U. S. District Court for the Northern District of Georgia noted the inconsistency between plaintiff's argument in that case and plaintiff's argument in the Washington case, 73-38 before this Court. *U. S.* v. *Citizens and Southern National Bank,* (Civ. No. 15823),——F.Supp.——ATRR No. 650, p. D-1 (D. Ct., N. D. Ga., Jan. 25, 1974). In both the Trans Texas and the Citizens and Southern cases the banks involved were central city banks (in El Paso and Atlanta) which had sponsored suburban banks that later became branches. So far as the reported opinions disclose, in neither case was there any attempt to invade the service area or market of another bank in contravention or circumvention of law.

At best the argument of plaintiff that there is a potentiality for circumventing the state laws involved in these cases is an unseemly argument to come from a government agency charged with enforcing and upholding the law. At worst, plaintiff's argument may be taken as advocacy for flouting the plain purpose and intent of the state laws. In any event, and under any interpretation, the state laws stand as a clear objective barrier to entry by the banks into the areas they seek to serve through merger by any other legal means than merger. Regardless of ingenious schemes that may be suggested for circumventing these barriers, the indisputable and objective fact of the existence of the laws make the schemes for their circumvention at best

hazardous and at worst disastrous. On a strictly logical basis, a course which must be judged to range from hazardous to disastrous cannot be judged prudent or probable for a bank. Therefore, judged quite objectively, potential competition which depends upon a bank undertaking such a course cannot be probable, and it clearly was not imminent in either case. Consequently the argument that potential competition may be lessened by the proposed mergers because they foreclose alternatives which involve challenging state laws are fallacious and without any foundation.

Furthermore the plaintiff's position in these cases is basically inconsistent with the purposes of the antitrust laws. The existence and vitality of the dual banking systems, has provided far more competition in banking than in any other country or most other American industries. In banking there is no danger of the "adverse influence on local affairs of out-of-state acquisitions" feared by Justice Douglas in the *Falstaff* case. 410 U.S. 543. On the other hand, if plaintiff's thesis is accepted, that the antitrust laws require or favor efforts to circumvent state laws, then the dual banking system may indeed be endangered. In that event, the result is likely to be a far less competitive banking system in this country.

VI. PLAINTIFF'S THEORY OF POTENTIAL COMPETITION IS NOT APPLICABLE TO BANKING WHERE ENTRY IS CONTROLLED BY THE GOVERNMENT.

Although antitrust cases tend to be complex and difficult at best, those involving plaintiff's theory of potential competition are particularly difficult, largely because the concept itself is abstract and ill defined. It must be remembered that potential competition is

a theory developed by the enforcement agencies and apparently derived from a series of decision in this Court which, in effect, characterized "unsuccessful bidders" or probable and imminent participants in a market as potential competitors. The decisions of this Court reviewed above make it clear that the competition referred to by § 7 is not that which is merely possible but that which is probable and imminent. It follows that "potential competition" which is within the meaning of §7 must be that which is probable and imminent rather than merely possible.

The meaning of the term "competition" in the potential competition theory is even easier to specify. The term clearly does not mean actual rivalry in the market, which is the usual meaning of "competition" but rather means entry into the market. This is made clear by both implicit and explicit reference throughout the plaintiff's briefs in both companion cases. Plaintiff throughout its two briefs refers to a potential competitor as a "potential entrant" and to potential competition as "potential entry."[44]

Consequently, it is clear that the abstract and somewhat opaque term "potential competition" for purposes of antitrust analysis actually means probable entry. This is confirmed by plaintiff's arguments throughout both briefs that the mergers should be barred in order to preserve the alleged possibility of de novo or foothold entry into the respective banking markets. Indeed, this is the whole of plaintiff's case.

Part of plaintiff's difficulty in bank merger cases arises from its failure to follow through with an

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[44] Pl. Wash. Br. 4, 22, 23, 26, 27, 29, 30, 31, 34, 36, 37, 38, 41, 42, 45, 53; Pl. Conn. Br. 18, 33, 45, 46, 55, 57, 58, 59.

economic analysis of the purpose and conditions of market entry. The economic function of market entry is to increase competition by increasing supply which, in turn, will theoretically result in lower price and better service to customers. The antitrust laws are not designed to serve economic abstractions, such as supply and demand, but rather to serve the public interest in the allocation of economic resources, the lowest prices and the best service. *Northern Pacific Railway* v. *U. S.*, 356 U.S. 1, 4.

Thus the doctrine of potential competition is appropriate to and serves the purposes of the antitrust laws only insofar as it is effective in preserving or stimulating the economic forces which result in market entry and competition in providing greater supply and service. In many industries and markets there is a significant place for such a doctrine.

However, the area for the application of the theory of potential competition in the field of banking, if any, is narrowly circumscribed by the fact that both entry and supply are closely controlled by Government. As this Court noted in the Philadelphia Bank case in the field of banking "entry is, of course, wholly a matter of governmental grace." 374 U.S. 367, n. 44. Before any person or firm may even begin organization of a national bank it is necessary for the applicant to submit an application to the Comptroller of the Currency, which investigates, inter alia, the earning prospects of the proposed bank and the convenience and needs of the public to be served. 12 CFR §4.2. The determination by the Comptroller as to whether the earnings prospects of the proposed banks and the convenience and needs of the public to be served warrants the issuance of a charter is

controlling unless it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and a finding that the proposed bank is an uneconomic venture in light of the banking needs and services already available in the surrounding community is an adequate reason for denying an application for a new charter. *Camp* v. *Pitts,* 411 U.S. 138.

Plaintiff's argument with respect to the application of its potential competition theory in the field of banking is not only inconsistent with these authorities but is directly contrary to them. Thus plaintiff argues that the decision of the Comptroller is bound to "reflect the national policy in favor of market extensions by internal expansion rather than by acquisition . . ." (Pl. Wash. Br. 51; Pl. Conn. Br. 53.) Consequently, plaintiff argues that "only if new entry might threaten the stability of existing banks could the Comptroller properly refuse to permit new competition." (Pl. Wash. Br. 52.) Despite the fact that both of these briefs were filed long after the decision of this Court in *Camp* v. *Pitts, supra,* they wholly ignore the plain holding of that case.

Plaintiff's argument rests upon the application to the two cases now before the Court of the rule enunciated in *U. S.* v. *First City National Bank of Houston,* 386 U.S. 361, and *U. S.* v. *Third National Bank in Nashville,* 390 U.S. 171. In those cases the Court enunciated the rule that "Congress intended bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny, it was to be permissible only if the merging banks could establish that the merger's benefits to the community would outweigh its anti-competitive disadvantages." 390

U.S. 182. The determination of the district court, rather than of the banking agency, is determinative under the Bank Merger Act and this avoids the "serious constitutional questions" of having the courts perform non-judicial tasks since it involves applying the antitrust laws according to the rule of reason. 386 U.S. 369. Both of these cases, as well as the other banking cases on which this Court has written, have involved a lessening of actual competition and have, therefore, permitted the courts to perform their accustomed function of applying antitrust principles.

However, when no actual competition is involved and the alleged competitive effect involves only potential competition or entry an altogether different logical situation is presented. Whether or not de novo entry would or will be permitted by the banking authorities depends upon congeries of subtle considerations clearly entrusted to the broad discretion delegated by Congress to the Comptroller in the complex field of national banking. *Camp* v. *Pitts,* 411 U.S. 138; *Ramapo Bank* v. *Camp.* 425 F.2d 333 (3d Cir. 1973), cert. den. 400 U.S. 828; *Seattle Trust and Savings Bank* v. *Bank of California* (9th Cir., Jan. 30, 1974); *Bank of Commerce* v. *City National Bank of Laredo,* 484 F.2d 284 (5th Cir. 1973).

Thus plaintiff's argument is impaled on the horns of a logical dilemma: in a potential competition case there is no lessening of competition within the meaning of §7 unless there is a probable de novo entry as an alternative to the merger; but there can be no probable entry unless the Comptroller is satisfied that such entry will serve the convenience and needs of the community. Therefore there cannot be an initial application of a conventional antitrust law test to be followed

by consideration of the convenience and needs test. The rule of the Houston Bank and Nashville Bank cases is inapplicable to cases brought on a theory of potential competition not because of any implied immunity but because of an inherent logical contradiction.

It is plaintiff's theory of potential competition that necessarily rests upon a showing of probable entry. Under the statutes, regulations and decisions of this Court, probable entry, in turn, rests upon the Comptroller's judgment as to the convenience and needs of the community and other factors. Therefore, in order to show a lessening of potential competition plaintiff is logically required to establish probable de novo entry as an alternative which, in turn, rests upon a showing that such entry will meet the convenience and needs of the community under the standards applied by the banking authorities charged with regulation of the field. In other words, in banking cases probable entry cannot be determined without a determination as to convenience and needs, and, consequently, in banking cases based upon the theory of potential competition, or probable entry, the competitive issue cannot be decided independently of or prior to the convenience and needs issue. Therefore the plaintiff's arguments regarding the convenience and needs issue in both cases (Pl. Wash. Br. 67 *et seq.*; Pl. Conn. Br. 66 *et seq.*) are entirely irrelevant and beside the point.

In both cases the Comptroller found that de novo entry was legally barred and economically impractical and that each proposed merger would serve the convenience and needs of the community and would not lessen potential competition. (Wash. App. 398 *et*

seq.; Conn. App. 2566 *et seq.*) In order to meet its burden on the competitive issue in these cases, plaintiff must show that these findings were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and it has not even attempted to do this. Consequently, it must be concluded that plaintiff's theory of potential competition, which means probable entry, is not applicable to bank merger cases, at least where plaintiff is unable or unwilling to assume the burden of establishing that the convenience and needs of the community require the banking authorities to permit new entry on the basis of banking, rather than merely antitrust, standards.

Consideration of the theory underlying the regulation of banking will demonstrate that this legal conclusion is consistent with and supportive of the theory upon which our banking system and its regulation is founded. The most recent edition of the most widely used and highly respected basic text book on economics, Paul A. Samuelson, Economics (9th ed. 1973) notes that until fairly recently "the American history of bank failure and losses to depositors used to be a grievous one" (p. 292). Thus only about one-half the banks in existence in 1915 are still solvent and even in 1929 before the beginning of the depression no less than 659 banks failed. (Id.) Samuelson points out that it is a fallacy to believe that individual banks can "create money" since each bank can loan or invest only those funds which it has on deposit. However, "The banking system as a whole can do what each small bank cannot do . . ." (pp. 301, 311). Although individual banks cannot expand total money supply the system as a whole can expand, through the operation of the reserve ratio, since one dollar in

reserves can be passed to another bank in the system which can make loans or investments on the basis of the same amount. The limitation on the expansion in loans and investments which is permissible is determined by the reserve ratio that is set by the Federal Reserve Board. Samuelson says that the Federal Open Market Committee which exercises this function has, for this reason, been called "the most powerful group of private citizens in America" because it controls the nation's money supply (p. 293). Samuelson says that: "The main function of legal reserve requirements is *not* that of making deposits safe and liquid, payable on demand. Their vital function is to enable the Federal Reserve authorities to *control* the amount of demand deposits—or bank money—that the member banks can create. By imposing fixed legal reserve requirements, the Fed (sic) can *limit* the growth of bank deposits to *its* desired target." (p. 299.)

In short, in the field of banking the commodity involved is money and the supply is not controlled by normal economic forces but by government authority. Thus the entry of a new bank into a local banking market does not have the same effect that the entry of an industrial or business firm does in an unregulated market. In an unregulated market a new entrant increases the supply and therefore increases the competitive pressures on one side of the supply-demand price equation. In contrast, in banking the supply is controlled by governmental authority and the addition of a new entrant to a local market has no substantial effect upon the total money supply. Consequently, the convenience and needs of a particular banking market may be better served by the merger of a bank in that market with an outside bank which

is able to provide resources that result in the improvement of services within the banking market than by entry de novo or on a foothold basis. The Comptroller found this to be the situation in both of the cases now before the Court. (Wash. App. 398, 400-401; Conn. App. 2566 *et seq.*)

The application of both §7 and the Bank Merger Act to the bank mergers involved in these cases is not questioned. However, the two cases now before the Court involve no allegation of any lessening of actual competition. The entire contention of plaintiff is that the mergers lessen the possibility of future de novo entry. But, as a matter of law, this possibility necessarily requires an administrative determination that new entry serves the convenience and needs of the community and meets the other banking standards by which applications for new entry are judged. Therefore, as a matter of established law and inexorable logic the antitrust test of §7 alone cannot be applied to these cases without first determining the question of probable entry on the basis of community convenience and needs and other relevant banking standards. Plaintiff has not even attempted to do this and this is obviously the insuperable obstacle to plaintiff's theory in the cases before the Court. Consequently, the result is inescapable that plaintiff's theory simply is not applicable to these two cases or other similar cases in the field of banking.

This conclusion explains the judicial record of plaintiff's uniform failure to date in opposing bank mergers on its potential competition theory. It is not reasonable to suppose that nearly a dozen separate district courts are so biased against the U.S. Department of Justice that none of them has been able to

find any substance or merit whatever in any case brought by the plaintiff under this theory in the field of banking. It is far more reasonable to suppose that plaintiff has misconceived the application of this theory to banking and thus has been unable to convince any court before which it has appeared that its theory of potential competition should apply to the field of banking.

The logic of plaintiff's argument on the application of this theory to the field of banking is further persuasive evidence of the fallacy of such an application. Plaintiff argues that banking markets are necessarily limited to each state and tend to be local. (Pl. Wash. Br. 32-33; Pl. Conn. Br. 32.) Thus it is apparent that there are at least several hundred banking markets in the country and, as noted above, there are about 14,000 commercial banks in the United States as of the end of 1972.[45] Despite these hundreds of markets and thousands of competitors plaintiff notes the strange fact that all "such markets inherently tend to be concentrated." (Pl. Wash. Br. 32; Pl. Conn. Br. 32.)

On the basis of common sense analysis it seems most unlikely that thousands of competitors dealing in a fungible commodity in hundreds of markets should produce a condition in which all markets are "highly concentrated". In the absence of a nationwide conspiracy among these thousands of competitive banks, which has never been charged, there must be some explanation other than chance or the normal operation of economic laws to explain this extraordinary situation. Analysis of the known facts and the record in the two cases before the Court taken to-

[45] Statistical Abstract of U. S. 1973, p. 446.

gether with plaintiff's argument provides an explanation. Plaintiff argues that a determination of the effectiveness of competition in banking must be based upon consideration of such indicia as the level of profits. (Pl. Wash. Br. 62-63.) The District Court in Connecticut found that the returns on invested assets in the banking industry average less than 1 per cent which suggests that "prices and return on assets are being kept down through competition." 362 F. Supp. 262, Finding 164.

As pointed out above, one of the purposes of the banking laws and government regulation in the field is to protect the solvency and stability of banks in order to protect the general public. Therefore, banking authorities have limited entry into the field of banking to those situations in which it can be shown that there is a community need for a new entrant and that the proposed banking entrant will have reasonable earnings prospects. This has resulted in limiting the number of banks in banking markets to that number which those markets can economically support. (Pl. Wash. Br. 32.) Plaintiff has simply postulated a definition of "concentration" by which any market with such a limited number of competitors is to be deemed concentrated. Plaintiff has then proceeded to argue that §7, having been enacted to prevent something also referred to as "economic concentration" should be applied to prevent the condition found in all banking markets. However, §7, by its express terms, forbids only mergers which substantially lessen competition. The testimony of plaintiff's own economic expert is that banking markets which are "highly concentrated" may also be "highly competitive". (Wash. App. 534.)

In cases such as those now before the Court which involve only an allegation of lessening potential competition in the field of banking, it would follow from plaintiff's definitions and argument that all banking mergers are prohibited by §7 since they all occur in markets which plaintiff has defined as "highly concentrated" regardless of whether or not they are actually competitive. Furthermore, since the alleged concentration arises from the judgment of the banking authorities that the banking markets have that number of competitors which the markets can economically support and which the convenience and needs of the communities to be served require,[46] it follows that the application of the principles urged by plaintiff would not only prohibit all mergers in the field of banking but would destroy the power of the banking authorities to control entry, would supersede all of the banking laws, regulations and principles by the single test of §7, and would destroy the governmental plan of regulation which has been developed over the years to protect the solvency, stability and economic utility of the banking system.

Consequently, as a matter of logic, of established legal principle and of the pragmatic test of reasonable results, it seems compellingly clear that the plaintiff's theory of potential competition is inapplicable to bank merger cases.

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[46] As was established in the Connecticut case, the banking authorities are continuously confronted with more applications for new charters than their standards permit them to grant. (Conn. App. 1029-1030; 2381-2384; 2387-2390; 2573-74.)

VII. PLAINTIFF HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF AND HAS OFFERED ONLY AN ABSTRACT THEORY TO SHOW ANTICOMPETITIVE EFFECT.

In United States v. First City National Bank of Houston, 386 U.S. 361, this Court considered the status of antitrust suits brought by the Department of Justice against bank mergers following passage of the Bank Merger Act of 1966. The Court held that "an action challenging a bank merger on the ground of its anticompetitive effects is brought under the antitrust laws." 386 U.S. 363. The Bank Merger Act established a special defense in such actions based upon community convenience and needs. The Court held, in effect, that plaintiff has the burden of proof on the antitrust, or anticompetitive, issues, and defendants have the burden on the convenience and needs defense.

In an antitrust suit brought by the Department of Justice, as in other actions, the burden of proof is on the plaintiff to establish all the ultimate facts in order to prevail. *U.S.* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 381; *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 363.

In a suit brought under §7, plaintiff has the burden of proving all the elements showing a violation of that section, including the line of commerce, the section of the country in which the effects of the merger may be felt, and whether the merger may substantially lessen competition or tend to create a monopoly. *U. S.* v. *Bethlehem Steel Corporation*, 157 F. Supp. 877 (S.D.N.Y. 1958). See also *Brown Shoe Company* v. *U. S.*, 179 F. Supp. 721 (E.D. Mo. 1959); *aff'd. on other grounds*, 370 U.S. 294 (1962).

In the instant case, as in the seven earlier potential competition bank merger cases, plaintiff has failed to carry the burden of proof. See, *United States* v. *Marine Bancorporation, CCH Trade Cases* ¶ 74,496 (E.D. Wash. 1973); *United States* v. *United Virginia Bankshares Inc.*, 347 F. Supp. 891, 895 (E.D. Va. 1972); *United States* v. *First National Bancorporation*, 329 F. Supp. 1003, 1016 (D. Colo. 1971), *aff'd mem.*, 410 U.S. 577 (1973); *United States* v. *Idaho First National Bank*, 315 F. Supp. 261, 270-271 (D. Idaho 1970); *United States* v. *First National Bank of Maryland*, 310 F. Supp. 157, 161, 178 (D. Md. 1970); *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161, 1195 (S.D. Miss. 1969); *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 199 (N.D. Cal. 1967).

In the instant case plaintiff has failed to prove not just one element of the alleged statutory violation but all elements. With respect to the line of commerce, plaintiff offered no proof that commercial banking is a realistic product market in a State where savings banks are, or in the near future will be, virtually interchangeable with commercial banks for the vast majority of the public. At the least, plaintiff should have tried to show that the elements of banking competition in present day Connecticut approximate the circumstances in *Philadelphia*. In addition, some basis should have been furnished for plaintiff's apparent view that the line of commerce in an actual competition case, such as *Philadelphia*, is equally appropriate in a case involving only potential competition. The record is devoid of evidence on this point.

With respect to the relevant geographic market, plaintiff offered banking markets defined solely by the boundaries of the Standard Metropolitan Statistical Area. The SMSA concept, however, was not developed for delineating banking markets. Thus, unless further analysis is performed, its usefulness is limited. Plaintiff could have made a more credible case for the SMSA had it established that a high percentage of SMSA residents were banking customers within the same SMSA. 362 F.Supp. 281-282. But plaintiff did not make any attempt to do this, and once again a vital element of §7 remained unproved.

Having failed to prove both of the first two elements of §7, plaintiff could not, of course, establish the third element, a substantial lessening of competition. After the collapse of plaintiff's proof on the line of commerce and relevant geographic market issues, all that remained to plaintiff's case was speculation about how defendants might one day come into competition with each other absent the merger.

Plaintiff alleges that this merger may substantially lessen competition because it eliminates the possibility that defendants may one day engage in direct competition with each other.

Even if this theory of potential competition is valid, its abstractions must be fleshed out with concrete facts. Otherwise, it remains only a hypothesis and void of real meaning. This is because much potential competition is simply too remote, speculative or improbable to have demonstrable competitive significance. The elimination of such marginal potential competition is not so serious in its probable effects as to require remedial action under the antitrust laws.

It is only when entry of a potential competitor is probable that the threat of his entry is likely to exercise a restraining influence on the pricing and other behavior of the dominant firms in the market. *Beatrice Foods Co.*, 67 FTC 697 at 719 (1965).

Plaintiff did not show to the District Court's satisfaction that the entry of either defendant into the other's market was probable or that competitors in the market perceived any threat of entry. Rather, plaintiff relied exclusively on concentration ratios to establish the anticompetitive effect. (See Pl. Br. 63-65) Evidently, plaintiff believes this is sufficient, citing several actual competition cases in which concentration ratios were found to be significant.[47] More, however, is required, even in actual competition cases. See *Brown Shoe Co.* v. *U. S.*, 370 U.S. 294, 321-322 and n. 38; *General Dynamics, supra,* slip opinion at 9-11, 23. And, clearly, more is required in cases alleging the elimination of potential competition. *Proctor & Gamble, supra,* 386 U.S. at 580-581; *Falstaff, supra,* 410 U.S. at 532-533. Some of the additional factors that must be analyzed are set forth in a Federal Trade Commission order dismissing a staff complaint in *Beatrice Foods Co.*, 3 CCH Trade Reg. Rep. ¶20, 121 (Sept. 28, 1972):

> Complaint counsel in essence attempt to rest their case on the existence of concentration ratios alone. The test for finding injury due to elimination of a potential competitor is not simple. Additional factors enter into any analysis of the loss of a potential competitor. Among these are:

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[47] *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); *Philadelphia, supra;* Pl. Br. 64.

trends toward concentration in the market; extensive entry barriers; high probability that the lost potential competitor would have actually entered the market; whether the lost potential competitor was one of only a few such potential competitors and whether, if he had entered the market, his new competition would have had a significant impact on price and quality. Although the number of competing firms or trends toward concentration may be enough without more to condemn many horizontal mergers between existing rivals in a market, the condition of entry by new firms as well as these other factors mentioned above must be considered when dealing with elimination of a potential competitor. Even though elimination of a potential competitor may have substantial anticompetitive effects, unlike a merger between actual competitors, it does not increase one firm's existing share of the market or eliminate actual competition. The distinction between the two types of competition—actual and potential competition—must not be lost sight of. 3 CCH Trade Regulation Reports at p. 22, 109. [Footnotes omitted]

Plaintiff did not present sufficient evidence on these factors to convince the trier of fact. Nor did plaintiff properly consider how legal and regulatory barriers should be evaluated with respect to the probabiilty of entry. Although it was not their burden to do so, defendants undertook the necessary objective analysis, showing (1) that there is no trend toward concentration in Connecticut as a whole (Findings 147 and 148) or in the New Haven SMSA or in the Bridgeport SMSA (Findings 158 and 159); (2) that legal and regulatory barriers make the prospect of significant competition between the two defendants unlikely in the foreseeable future (see 362 F. Supp.

286-287); (3) that the merger will not eliminate the largest or nearest potential entrant in any of the 125 open towns in Connecticut (Finding 108); and (4) that in no town would there remain after the merger less than four potential entrants cited by plaintiff as having the capacity to become statewide competitors. (Finding 109) Clearly it was defendants rather than plaintiff who furnished objective evidence of the merger's effect on competition.

Plaintiff also failed to introduce any objective evidence to support its contention that this merger would "trigger" other mergers among Connecticut's largest commercial banks. (See Pl Br 60-62) Indeed, plaintiff's only witness on "triggering" refused during direct examination to substantiate plaintiff's theory. (Finding 228, App. 397-398) Moreover, any such wave of mergers is highly improbable inasmuch as Connecticut's largest banks are already in substantial direct competition with one another and regulatory authorities would undoubtedly refuse to approve such transactions. (See generally, Findings 225-230 and the District Court's opinion, 362 F. Supp. 287-288)

VIII. THE RESULT OF THIS MERGER WILL BE TO INCREASE EFFECTIVE COMPETITION

As discussed earlier in some detail, *supra*, pp. 67-68, this merger will increase competition in Connecticut. The merger is the only means by which an unhealthy balance now favoring the Hartford banks may be redressed. After combining their resources and selling six branches in the four town area, defendants will have the capacity to challenge the Hartford banks in their home town and in other parts of the state. Moreover, defendants will be in a better position to

provide effective competition to the New York and Boston banks that transact substantial business in the state.

Failure to consummate the merger will assure defendants' status as locally oriented banks. This in turn will perpetuate the dominance in Connecticut of Hartford National Bank and Connecticut Bank and Trust Co. (App. 613) When it is recognized that in a span of less than three years (December 31, 1969 to September 30, 1972) the two Hartford banks increased their deposits in an amount greater than the entire deposit structure of the merged bank, one realizes the inadequacy of the market power possessed by the eight remaining banks that plaintiff has identified as having statewide potential. This conclusion is further substantiated by facts showing that during this two and one-half year period, Hartford National and Connecticut Bank and Trust increased their deposits by 40.8 percent and 47.8 percent, respectively, while First New Haven and Connecticut National together experienced a deposit increase of only 21.7 per cent. (Findings 161 and 162; App. 943, 2379)

These objective facts, as well as others not set forth here (see, e.g., Findings 28 and 30, 362 F. Supp. 245), overwhelmingly support the District Court's view that the two Hartford banks dwarf the next largest eight banks in competitive clout. While the Hartford banks grow more dominant, other banks grow correspondingly weaker. (App. 611-612; Finding 31) As a result of their market power, the Hartford banks can be expected to spread across the state at a rate four or five times faster than any other bank. (Finding 27; App. 914-915) A merger which can arrest this trend and create a better balanced banking structure

for Connecticut is procompetitive and vital to the public interest.

IX. A FINDING BY THE DISTRICT COURT ADVERSE TO PLAINTIFF ON THE ISSUE OF COMPETITION DOES NOT PRECLUDE OR INVALIDATE A FINDING ON SERVING THE CONVENIENCE AND NEEDS OF THE COMMUNITY.

In both bank merger cases now before the Court the District Courts weighed the evidence of procompetitive and other probable convenience and needs benefits against anticompetitive effects alleged by plaintiff. Plaintiff argues the District Court was not entitled to evaluate the convenience and needs defense "on an abstract basis" by assuming *arguendo* that plaintiff had proven its case, citing United States v. Third National Bank of Nashville, 390 U.S. 171, 183. Pl. Wash. Br. 68-69; Pl. Conn. Br. 67-68. Plaintiff's reliance on Nashville is misplaced. The District Court in Nashville concluded in its opinion (260 F. Supp. at 883): "As the Court . . . concludes that the merger does not violate the antitrust standards of the 1966 Amendment, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community." This Court therefore had no alternative on these facts but to remand the case for a weighing of the convenience and needs defense as the District Court had not previously made any determination of that matter. To suggest, as plaintiff does, that Nashville precludes a District Court from weighing assumed anticompetitive effects against benefits to the community convenience and needs resulting from a bank merger would be to mandate two separate trials in every case in which the District Court found against plaintiff on the issue of competition. This might suit plaintiff's purpose, but

it would result in placing an unreasonable and oppressive burden on banking which exists in no other industry and which is clearly contrary to the legislative intent of the Bank Merger Act of 1966, which was to lower, not raise, the barriers to bank mergers.

This Court apparently had that point in view in Nashville, as this Court's opinion in Nashville specifically negatives plaintiff's argument and states that a district court's improper assessment of a bank merger's anticompetitive impact does not automatically invalidate a finding that the merger is nevertheless lawful because of its convenience and needs benefits. 390 U.S. at 184, n. 17.

Further, plaintiff's interpretation is inconsistent with its own argument of potential anticompetitive effects. Since plaintiff's theory admittedly involves only potential rather than actual competitive effects, some assumption about the nature of the alleged effects must be made for the purpose of evaluating the convenience and needs definition. Under plaintiff's analysis, the affirmative defense of convenience and needs could never be weighed against actual anticompetitive effects since plaintiff need prove only potential anticompetitive effects. Thus, in potential competition cases courts can weigh only presumed anticompetitive effects against convenience and needs benefits in any event, so plaintiff's objection to the courts' assuming the alleged anticompetitive effects only for the purpose of weighing convenience and needs is completely without merit.

Moreover, the Bank Merger Act of 1966 requires that "[i]n *every* case, the responsible agency *shall* take into consideration the financial and managerial

resources and *future prospects* of the existing and *proposed institutions,* and the convenience and needs of the community to be served." 12 U.S.C. 1828(c)(5)(B) [Emphasis added.] The Act further provides that "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)." 12 U.S.C. 1828(c)(7)(B). Thus, the Comptroller and the other banking agencies *must* consider the convenience and needs of the community in *every* case, whether or not it is determined the merger in question violates §7 of the Clayton Act.[48] Likewise, in a judicial challenge to a merger approval, the courts must also consider the matter of convenience and needs, whether or not the Department of Justice proves a probable anticompetitive effect.

The district courts clearly followed this statutory scheme. To weigh the convenience and needs it was necessary for the courts below to assume that plaintiff's alleged potential anticompetitive effects had been proved. The courts then found that the convenience and needs benefits outweighed the alleged potential anticompetitive effects. Wash. App. 1941-1950, F. 25; Conn. 362 F. Supp. 270-278, F. 231-293, 362 F. Supp. 288, Concl. E 1-7. These findings and conclusions were fully warranted by the evidence and proper under both statutory provisions and the views previously expressed by this Court.

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[48] The Act says "in every case", not "in every case where an antitrust violation occurs."

X. SINCE THE ULTIMATE TEST OF A BANK MERGER IS THE PUBLIC INTEREST, THE DISTRICT COURT FINDING OF SERVICE TO COMMUNITY NEEDS AND CONVENIENCE VALIDATES THE MERGER

Although the discussion of bank merger cases is conventionally in terms of §7 since that embodies the antitrust standard for mergers, bank mergers, unlike those in other fields, are subject to a special balancing test. Following the decision of this Court in the Philadelphia bank case Congress enacted the Bank Merger Act of 1966, which establishes the statutory standards for all bank mergers. The effect of the Bank Merger Act can be most succinctly and authoritatively stated in the words of this Court itself. In *U. S. v. Third National Bank in Nashville,* 390 U.S. 171, this Court said (at 184-185):

> The purpose of the Bank Merger Act was to permit certain bank mergers even though they tended to lessen competition in the relevant market. Congress felt that the role of banks in a community's economic life was such that the public interest would sometimes be served by a bank merger even though the merger lessened competition. The public interest was the ultimate test imposed.
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> * * * *
>
> It is plain that Congress considered both competition in commercial banking and satisfaction of "the convenience and needs of the community" to be in the public interest. It concluded that a merger should be judged in terms of its overall effect upon the public interest. If a merger posed a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit were to be weighed and decision was to rest on which alternative better served the public interest.

This Court went on to say that such things as a greater lending capacity, and hence the ability better to serve the financial needs of the community was a relevant consideration under the test established by the Bank Merger Act although this element had been rejected as irrelevant in the Philadelphia bank case prior to enactment of the Bank Merger Act.

As pointed out in the preceding section the Bank Merger Act requires the banking agency and the reviewing court to balance the competitive effects against the convenience and needs of the community in every case. In the instant case the Court performed this function with meticulous care and its findings are entitled to the same weight upon review as all other findings of fact by the District Court which sits in the community involved, hears the witnesses, examines and weighs the evidence, has discussions with counsel, and gives the case the time, effort, and detailed analysis which is impossible for this Court acting in its appellate capacity.

Another element that is present in the two companion bank merger cases now before this Court, which has not been present in the cases previously decided by this Court, is that the balancing of competitive considerations against community convenience and needs is necessarily different in a potential competition case. In the bank merger cases which this Court has previously considered and decided by opinion the mergers have involved banks in actual competition with each other. Consequently in each of these cases actual competition was being extinguished and the benefits to the community arising out of service to community convenience and needs were required to

be so great as to outweigh the loss of actual competition in order to legalize the merger.

In contrast the bank merger cases now before the Court involve no loss of actual competition. The cases come to this Court only on the allegation that potential competition may be lessened. As the cases have been developed by evidence and argument it has become apparent that the potential competition referred to involved only the possibility of some hypothetical future entry into the market or service area of one of the merging banks. It can hardly be contended, even by plaintiff, that the loss of some hypothetical future possibility weighs as heavily as the loss of actual present competition. Therefore the showing of benefit through service to community convenience and needs certainly must be somewhat less in a potential competition case in order to outweigh any alleged competitive loss than it would be in a case involving the extinction of actual existing competition.

Nevertheless the Court in the instant case made detailed and meticulous findings of substantial benefits to the community which would result from the merger. The findings of the Court on this point, and the evidence supporting them are reviewed in some detail in Section II of this brief. However, it may be useful simply to summarize briefly benefits found by the Court in services to the community resulting from the proposed merger.

(1) The court found the proposed merger would result in numerous services to individuals in the State of Connecticut. These would include benefits to some 15,000 Connecticut residents who hold insurance policies of the Knights of Columbus through more con-

venient and efficient means of paying premiums. (App. 1275, 1277-1278). Housewives, small business men and others will have a broader range of banking services covering a wide variety of matters. (App. 1115).

(2) The court found that the increased lending limits of the merged bank would enable it to give better service in financing business, particularly small and medium-size businesses in the Bridgeport and New Haven areas. (App. 437, 492-493, 896). The merged bank would keep funds represented by "compensating balances" within the state, for use by individuals and businesses in Connecticut, which are now flowing out of the state to New York and Boston banks. (App. 901, 1042-1043, 1256, 1257, 1267-1269, 1293-1294, etc.) Among the benefits which will flow to the citizens of Connecticut from this fact will be the ability of Connecticut contractors to finance housing projects for low-income residents, particularly public housing projects and "turnkey" projects which require substantial interim bank financing. (App. 1257-1258). The merger will also avoid the necessity, in many cases, of participation loans involving out of state banks, which are disadvantageous for both the businesses involved and Connecticut banks. (App. 494, 1153, 1241-1243, 1250-1251, 1260, 1267-1269, 1286-1288, 1290-1291, 1293-1294, etc.) While this will permit larger business loans it will also increase the amount of funds available to smaller borrowers. (App. 545-546.)

(3) The merger will make available much better international services to medium-sized businesses and will provide competition in this field to the two large Hartford banks, and the New York and Boston banks

within the State of Connecticut. (App. 908-910, 1115, 1146-1147, 1264-1271, 1288, etc.)

(4) The merged banks will provide vital municipal financing services to many Connecticut cities and towns. (App. 433, 448-449, 527, 908).

(5) The merged banks will be able to provide stock transfer services and other corporate services needed by Connecticut corporations, including access to Bank Wire, a service by which corporations can transfer money and credit between banks in different parts of the country by direct electronic interconnection. (App. 433, 908, 1244-1245, 1287-1288, 1294-1296).

(6) The merged bank will have better computer services which will offer an expanded array of services to both large and small businesses, and will assist the bank and its business customers in serving individual customers more efficiently. (App. 425, 433, 528-529, 908, 1115, 1258-1259, 1296-1297).

(7) The merged bank will provide improved trust services to wealthy individuals, to organizations like the Knights of Columbus, and to corporate pension plans and similar activities. (App. 421-422, 1115, 1275-1276, 1282-1283, 1288-1299, 1295-1296, 1325-1326).

(8) The merged bank will attract more capable personnel, and the stability of the staff serving bank customers will provide better assurance to the public of continued service. (App. 422-423, 425-427, 615, 1147).

(9) Disapproval of the proposed merger will strengthen and entrench the dominant positions of the two big Hartford banks and will increase the con-

centration of deposits held by these banks. (App. 506-507, 613-614, 1162). On the other hand, approval of the merger will provide a more competitive banking structure in Connecticut, will increase competition with the larger banks and thus will provide a more healthy banking system which will have a greater tendency to provide the benefits of banking competition to the public in Connecticut. (App. 507, 614-616, 1114-1115, 1162, etc.) All aspects of this matter were examined in great detail both by examination of witnesses and by analysis of statistical data, and the District Court concluded that the evidence decisively showed that "The combined bank . . . will provide significant competition for the two Hartford banks throughout the state, and more particularly in Hartford and in New London . . . The creation of another statewide competitor will slow the accelerating dominance of the state by the two large Hartford banks and will significantly deconcentrate their power in important counties of the state." 362 F. Supp. 288.

The District Court considered all of these, and other, factors, and weighed them carefully against all allegations, hypotheses and evidence of a lessening of potential competition. It concluded that by any test or standard any assumed or alleged anticompetitive effects were clearly outweighed by the convenience and needs of the public to be served. This conclusion is so abundantly supported by evidence and by the careful analysis of the record by the District Court that it cannot be assailed, much less reversed. Accordingly, for this reason alone the judgment of the District Court in this case must be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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